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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~826~~ 3

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 16, 1965
CERTIORARI GRANTED MARCH 21, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 826

FRANK COSTELLO, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11267

(Title 18, U.S.C., Section 371)

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI, and ARTHUR GJANCKI.

INDICTMENT—Filed October 6, 1964

The Grand Jury Charges:

Count One

That on divers dates between July 23, 1964 and October 6, 1964, at Bridgeport in the District of Connecticut, Frank Costello, James "Totto" Marchetti, and Arthur Gjancki, the defendants herein, did in violation of Title 18, United States Code, Section 371, conspire, confederate and agree with one another and with others to the Grand Jury unknown, to wilfully fail to pay to the District Director of Internal Revenue for the Internal Revenue District of Hartford, in violation of Title 26, United States Code, Section 7203, the special occupational tax of Fifty Dollars ($50.00) for the period ending June 30, 1965, imposed upon them by Title 26, United States Code, Section 4411, as persons engaged in the business of accepting wagers and receiving

wagers for or on behalf of a person liable for the said tax, and they committed the following overt acts, among others, in furtherance of and to effect the object of the conspiracy:

Overt Acts

1. On or about August 3, 1964, the defendant, James "Totto" Marchetti, did accept wagers at Bridgeport in the District of Connecticut.

2. On or about July 23, 1964, the defendant Arthur Gjancki, did accept wagers at Bridgeport in the District of Connecticut.

3. On or about October 2, 1964, the defendant, Frank Costello, did accept wagers at Bridgeport in the District of Connecticut.

4. On or about September 14, 1964, the defendants, James "Totto" Marchetti, Arthur Gjancki and Frank Costello, met at Bridgeport, Connecticut in the Lafayette Diner, [fol. 2] 963 Lafayette Street, Bridgeport in the District of Connecticut.

A True Bill

Adrian K. Lane, Foreman.

F. Owen Eagan, United States Attorney, Howard T. Owens, Jr., Assistant United States Attorney.

[File endorsement omitted]

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11269

(Title 26, U.S.C., Section 7203)

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO.

INDICTMENT—Filed October 6, 1964

The Grand Jury Charges:

Count One

Frank Costello, of Trumbull in the District of Connecticut, on or about October 2, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to pay the special occupational tax as required by 26 United States Code 4411, due and owing the United States of America for the year ending June 30, 1965, in violation of Title 26, United States Code, Section 7203.

Count Two

Frank Costello, of Trumbull in the District of Connecticut, on or about October 2, 1964, at Bridgeport, Connecticut in said District did engage in the business of accepting wagers as defined in 26 United States Code 4421, and did engage in receiving wagers for or on behalf of a person liable for the tax on wagers imposed by 26 United States Code 4401, having wilfully failed prior to engaging in said business and receiving said wagers to register as required by 26 United States Code 4412, in violation of Title 26, United States Code, Section 7203.

A True Bill

Adrian K. Lane, Foreman.

F. Owen Eagan, United States Attorney, Howard T. Owens, Jr., Assistant United States Attorney.

[fol. 4] [File endorsement omitted]

[fol. 4a]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,267

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO; JAMES MARCHETTI;
and ARTHUR GJANCI.

Criminal No. 11,270

UNITED STATES OF AMERICA,

v.

JAMES MARCHETTI.

MOTION OF DEFENDANT MARCHETTI IN ARREST OF JUDGMENTS AND TO DISMISS INDICTMENTS BASED UPON MATTERS WHICH SHALL BE NOTICED BY THE COURT AT ANY TIME DURING THE PENDENCY OF THE PROCEEDINGS—Filed January 6, 1965

* * * * * * *

1/11/65

Motion denied.

Wm. H. Timbers, Chief Judge.

[fol. 5] Part B.

1. Payment of the special occupational tax and the registration required by 26 U.S.C. §4411 and §4412, referred

to in the indictments, requires answering, *inter alia,* the following questions:

"Are you engaged in the business of accepting wagers on your own account?"

"Do you receive wagers for or on behalf of some other person or persons?"

These questions are contained in U. S. Treasury Department—Internal Revenue Service Special Tax Return and Application for Registry—Wagering (Form 11-C), a copy of which is annexed to this Motion as Exhibit B. Pursuant [fol. 6] to 26 U.S.C. §6011 (a) every person required to make a return or statement shall include therein the information required by such form.

2. Payment of the special occupational tax pursuant to 26 U.S.C. §4411 would compel defendant Marchetti to be a witness against himself within the meaning of the constitutional privilege against self-incrimination.

3. Registration pursuant to 26 U.S.C. §4412 would compel defendant Marchetti to be a witness against himself within the meaning of the constitutional privilege against self-incrimination.

Wherefore, defendant Marchetti moves that in Criminal Nos. 11,267 and 11,270 the judgments be arrested and the indictments be dismissed on the grounds that this Court lacks jurisdiction and the indictments fail to allege an offense because the statutes involved are violative of the Fifth Amendment to the United States Constitution and because there can be no conspiracy to violate an unconstitutional statute.

* * * * * * *

[fol. 7] Francis J. King, 1115 Main Street, Bridgeport, Connecticut; Jacob D. Zeldes, 955 Main Street, Bridgeport, Connecticut, Attorneys for defendant James Marchetti.

FORM 11-C
Rev. Mar. 1958

U. S. Treasury Department—Internal Revenue Service

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See instructions on reverse for time and place for filing return)

Return for period from ..... to June 30, 19.....
(Month, day, and year)

1. Name: True name.....

Alias, style, or trade name, if any.....

2. Address: Residence.....
(Number and street)

.....
(City) (County) (State)

Business.....
(Number and street)

.....
(City) (County) (State)

3. If this is merely an application for registry with which no remittance of tax is required, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

.....

.....

.....

.....

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

For District Director's Use Only

.....
(Stamp number)

.....
(Date issued)

.....
(Registration number)

Tax..... $.....
Penalty..... $.....
Interest..... $.....
Total..... $

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

5. Are you engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No
(Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is conducted.

Name of location	Street address	City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf .....

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State

6. Do you receive wagers for or on behalf of some other person or persons? ☐ Yes ☐ No
(Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

....., 19..... ....
(Date) (Signature) (State whether individual owner, member of firm, or if corporation officer, give title)

[fol. 8]

EXHIBIT B TO MOTION OF DEFENDANT MARCHETTI

[fol. 9] Certificate of service (omitted in printing).

[fol. 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11267

UNITED STATES,

v.

FRANK COSTELLO, et al.

Criminal No. 11269

UNITED STATES,

v.

FRANK COSTELLO.

MOTION OF DEFENDANT FRANK COSTELLO IN ARREST OF JUDGMENT—Filed January 9, 1965

The defendant Frank Costello moves the court pursuant to Federal Rules of Criminal Procedure 12(a)(2) and 34 to arrest judgment in the above entitled cases because:

1) Prosecution of defendant is barred because the statutes upon which the indictments are based are unconstitutional being in violation of the privilege against self

[File endorsement omitted]

1/11/65

Motion denied.

Wm. H. Timbers, Chief Judge.

incrimination clause of Fifth Amendment to the United States Constitution.

. . . . . .

[fol. 11] This defendant also incorporates and relies upon the brief filed by the defendant Marchetti in support of his motion in arrest of judgment in these cases, in support of the foregoing motion in arrest of judgment.

Dated at New Haven, Connecticut, this 8th day of January, 1965.

Respectfully submitted,

Philip R. Shiff, Adrian W. Maher, Attorneys for Defendant Frank Costello.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

No. 11,267 Criminal

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO.

JUDGMENT AND COMMITMENT—January 11, 1965

On this 11th day of January, 1965, came the attorney for the government and the defendant appeared in person and[1] by counsel,

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[File endorsement omitted]

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of violation of Title 18, Section 371 of the United States Code, (conspiracy to violate Title 26, Section 7203 of the United States Code,) as charged[3] in count number one and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] one (1) year. The defendant is required to pay a fine of Ten Thousand ($10,000) Dollars. This fine is to be a committed fine.

Execution of the sentence of imprisonment is stayed twenty-four hours.

~~It Is Adjudged that~~[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Wm. H. Timbers, United States District Judge.

The Court recommends commitment to:[6]

....., Clerk.

---

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number ..... " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[fol. 13]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

No. 11269 Criminal

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO.

JUDGMENT AND COMMITMENT—January 11, 1965

On this 11th day of January, 1965, came the attorney for the government and the defendant appeared in person and[1] by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of violation of Title 26, Section 7203 of the United States Code, (person engaged in the business of accepting and receiving wagers, failed to pay special occupational tax as required; and failed to register as required), as charged[3] in count numbers one and two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] one (1) year on count number one. The defendant is required to pay a fine of $10,000 on count number one. This fine is to be a committed fine. The sentence of imprisonment and the fine in this case are to run concurrently with the sentence imposed in Criminal Case No. 11,267.

Imposition of sentence is suspended on count number two and the defendant is to be placed on probation for a period of two years from the date of release from prison.

~~It Is Adjudged that~~[5]

Execution of the sentence of imprisonment is stayed twenty-four hours.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Wm. H. Timbers, United States District Judge.

The Court recommends commitment to:[6]

....., Clerk.

---

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[File endorsement omitted]

[fol. 14]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,267

UNITED STATES OF AMERICA,

v.

FRANK COSTELLO, et al.

NOTICE OF APPEAL—Filed January 12, 1965

1. *Name and address of Appellant*:

Frank Costello, 16 Glenarden Road, Trumbull, Connecticut

2. *Name and address of Appellant's Attorneys*:

Adrian W. Maher, 955 Main St., Bridgeport, Connecticut
Philip R. Shiff, 129 Church St., New Haven, Connecticut

3. *Offense*:

18 U.S.C. Section 371.

4. *Concise Statement of Judgment or Order Giving Date and Any Sentence*:

January 11, 1965. Denial of defendant's motion for acquittal under Rule 29(b) and in the alternative for a new trial under Rule 33 of Federal Rules of Criminal Procedure; denial of defendant's motion in arrest of judgment and to dismiss indictment pursuant to Federal Rules of Criminal Procedure 34 and 12(a)(2); sentence of one year, $10,000.00 fine.

I, the above named appellant hereby appeal to the U. S. Court of Appeals for the Second Circuit from the above stated judgment.

Dated at New Haven, Connecticut, this 11th day of January, 1965.

Philip R. Shiff, 129 Church Street, New Haven, Conn.,
Attorney for Defendant Frank Costello.

Service (omitted in printing).

[File endorsement omitted]

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Criminal No. 11,269

UNITED STATES OF AMERICA

v.

FRANK COSTELLO

NOTICE OF APPEAL—Filed January 12, 1965

1. *Name and address of Appellant*:

Frank Costello, 16 Glenarden Road, Trumbull, Connecticut

2. *Name and address of Appellant's Attorneys*:

Adrian W. Maher, 955 Main Street, Bridgeport, Connecticut
Philip R. Shiff, 129 Church Street, New Haven, Connecticut

3. *Offense*:

26 U.S.C. Sections 7203, 4411, 4412 (two counts).

4. *Concise Statement of Judgment or Order Giving Date and Any Sentence*:

January 11, 1965. Denial of defendant's motion for acquittal under Rule 29(b) and in the alternative for a new trial under Rule 33 of Federal Rules of Criminal Procedure; denial of defendant's motion in arrest of judgment and to dismiss indictment pursuant to Federal Rules of Criminal Procedure 34 and 12(a)(2); sentence of one year, $10,000.00 fine (to run concurrently with sentence in Criminal No. 11,267).

I, the above named appellant hereby appeal to the U. S. Court of Appeals for the Second Circuit from the above stated judgment.

Dated at New Haven, Connecticut, this 11th day of January, 1965.

Philip R. Shiff, 129 Church Street, New Haven, Conn., Attorney for Defendant Frank Costello.

Service (omitted in printing).

[File endorsement omitted]

[fol. 16]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 481/2/3/4—September Term, 1964.

(Argued June 8, 1965 Decided October 29, 1965.)

Docket Nos. 29524/5/6/7

UNITED STATES OF AMERICA, Appellee,

—v.—

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI and ARTHUR GJANCI, Appellants.

UNITED STATES OF AMERICA, Appellee,

—v.—

FRANK COSTELLO, Appellant.

UNITED STATES OF AMERICA, Appellee,

—v.—

JAMES "TOTTO" MARCHETTI, Appellant.

[fol. 17]

UNITED STATES OF AMERICA, Appellee,

—v.—

ARTHUR GJANCI, Appellant.

Before: Waterman, Friendly and Smith, Circuit Judges.

Appeals from judgments of the District Court for Connecticut, William H. Timbers, Chief Judge, convicting appellants, after a verdict, of offenses under the federal wagering tax laws. Affirmed.

Philip R. Shiff, New Haven, Conn. (Adrian W. Maher, on brief), for Appellant Frank Costello.

Jacob D. Zeldes, Bridgeport, Conn. (Francis J. King, David Goldstein, Joseph S. Catalano, on brief), for Appellant Marchetti.

Carroll W. Brewster (Gumbart, Corbin, Tyler & Cooper, New Haven, Conn., Kimberly B. Cheney, on brief), for Appellant Gjanci.

Jon O. Newman, United States Attorney (Howard R. Moskof, Assistant United States Attorney, on brief), for Appellee.

[fol. 18]

OPINION—October 29, 1965

Friendly, Circuit Judge:

These three appeals, along with *United States* v. *Piccioli*, —— F. 2d ——, and *United States* v. *Markis*, —— F. 2d ——, this day decided, stem from a raid carried out by Internal Revenue Service agents and state police in Bridgeport, Connecticut, on October 8, 1964. Appellants Frank Costello, James "Totto" Marchetti and Arthur Gjanci were tried together and convicted on all counts before Chief Judge Timbers and a jury under four indictments. Three two-count indictments similar in form charged each of them with violations of 26 U. S. C. §7203 in that, being engaged in the business of accepting wagers or receiving them for one so engaged, they wilfully failed (1) to purchase the occupational wagering tax stamp required by 26

U. S. C. §4411 and (2) to register as required by §4412. The fourth indictment charged all three with conspiring to fail to purchase the occupational tax stamps. Costello and Marchetti received concurrent one-year prison sentences and $10,000 fines in the conspiracy case and under Count 1 of their individual indictments; the imposition of sentence was suspended and probation for two years was imposed under Count 2. Gjanci's sentences differed in that the fine was $2,500.

Certain points are common to the three appeals and, to some extent, to the two others mentioned. After outlining the facts of this case, we shall deal first with these common points and then consider arguments peculiar to various appellants.

In the summer of 1964 Special Agent John Ripa of the I. R. S. was detailed to work in Bridgeport as an undercover agent, posing as a person wishing to make numbers and horse bets and later as a would-be bookmaker. He placed numerous bets with Gjanci and Marchetti at the [fol. 19] Lafayette Diner or, in some instances with respect to Gjanci, at the Greek Coffee House. On October 2, he placed bets with Costello, paying with two marked $20 bills which were found in Costello's pocket on the latter's arrest. Earlier, on September 3, he had asked Gjanci if he could set up an arrangement to turn in bets and receive a commission. Gjanci said he would speak to Marchetti to arrange this, and also that he would talk to his "bosses—Totto and Frank" about letting Ripa place bets at a local variety store; Gjanci referred to Costello as the "big boss of Bridgeport." On September 9, Marchetti arranged for Ripa to "book on 50%" with "Tony," with settlement to be made with Marchetti. On several later instances Costello made inquiries and gave directions whence the jury could infer that he was indeed "a boss"—if not indeed "the boss," in the enterprise. At trial Costello denied any involvement in the wagering business; Marchetti admitted accepting some bets from Ripa but denied others and also denied Costello's involvement; Gjanci did not testify.

I.

Appellants' most basic point concerns the constitutionality of the federal wagering tax. Recognizing that these provisions were sustained in *United States* v. *Kahriger*, 345 U. S. 22 (1953), appellants say their situation differs in two respects. One is that statements of the prosecutor and the judge demonstrated that the purpose of the Government's applying the statute against them was not to collect revenue, concededly the only available source of federal power, but to promote the enforcement of state laws against gambling; the other is that the enlargement of the self-incrimination clause of the Fifth Amendment to include federal compulsion of the admission of crime against [fol. 20] the states, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 53 n. 1, 77-78 (1964), overruling *United States* v. *Murdock*, 284 U. S. 141 (1931), and recent emphasis that the clause embraces all statements save those that "cannot possibly" tend to incriminate, see *Malloy* v. *Hogan*, 378 U. S. 1, 12 (1964), place the *Kahriger* holding on self-incrimination in question.[1]

With respect to the first contention, apart from questions as to what effect on constitutionality statements by

---

[1] Marchetti makes an additional argument based on the 1958 amendment, 72 Stat. 1304, which added to §4401(c) a provision that any person required to register under §4412 who receives wagers for or on behalf of another without having registered the name and residence of the latter as §4412(a)(3) requires, shall himself be liable for the tax on wagers to the extent of his receipts. He contends that since §4412 requires registration by persons required to pay the special tax by §4411 and §4411 requires such payment from anyone who is liable for the percentage tax under §4401 or is engaged in receiving wagers for or on behalf of a person so liable, a cross-reference to §4412 in §4401 necessarily renders the statute circular and unintelligible. We see no force in this argument. The 1958 amendment did not affect who was required to pay the special tax and to register, see 3 U. S. Code Cong. & Ad. News 4457 (1958); it simply made persons who failed to comply with the special requirement of §4412(a)(3) liable for the tax on wagers imposed by §4401, when they would not previously have been.

prosecutors and judges can have, nothing in the present record goes materially beyond what the Supreme Court characterized in *Kahriger* as "suggestions in the debates that Congress sought to hinder, if not prevent, the type of gambling taxed." 345 U. S. at 27 n. 3. If "the verbal cellophane of a revenue measure," 345 U. S. at 38 (dissenting opinion of Mr. Justice Frankfurter), was sufficiently opaque for a majority of the Supreme Court twelve years ago, it remains so for us now. Whether the judge impermissibly allowed considerations unrelated to the nonpayment of the tax to enter into sentence, a claim raised only [fol. 21] by Piccioli, is a different problem which we will discuss in the opinion in his case.

The contention with respect to the self-incrimination clause would be more serious if *United States* v. *Kahriger* stood alone, since whatever the stated basis for decision, the result followed so logically from the now-overruled *Murdock* doctrine. However, the Court again considered the Fifth Amendment objection in *Lewis* v. *United States*, 348 U. S. 419 (1955), which arose in the District of Columbia where wagering was a crime by federal law. The Court disposed of the argument on the basis that "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment." 348 U. S. at 422. If Congress can constitutionally require, as a condition to gambling, a registration that would show an intention to engage in a business prohibited by a federal law, we can think of no reason why it should not have the same power to require registration that would give notice of an intention to engage in activity made illegal by the laws of a state; and the probability of incrimination for future or even past acts, however great, is irrelevant on the Court's stated theory that the registration cannot be called compulsory. It is true that both

Kahriger and *Lewis* were decided over vigorous dissents by Justices Black and Douglas on the Fifth Amendment point. But we find no subsequent opinion reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow. Cf. *United States* v. *Zizzo*, 338 F. 2d [fol. 22] 577, 580-81 (7 Cir. 1964), cert. denied, —— U. S. —— (1965); *United States* v. *Cefalu*, 338 F. 2d 582 (7 Cir. 1964). We are therefore not required to consider other arguments on which the Government might rely, such as the lack of any claim of the privilege at an earlier stage, see *United States* v. *Sullivan*, 274 U. S. 259, 263-64 (1927); *United States* v. *Kahriger*, *supra*, 345 U. S. at 32, and the required records doctrine, see *Shapiro* v. *United States*, 335 U. S. 1 (1948); Meltzer, Required Records, the McCarran Act and the Privilege against Self-Incrimination, 18 U. Chi. L. Rev. 687 (1951).

II.

Appellants contend their trial was rendered unfair by publicity, much of it emanating from the Government.

The indictments against appellants and others were returned in New Haven on October 6, 1964; bail was fixed but the indictments remained impounded, F. R. Cr. P. 6(e), until October 8 at 2:36 P.M. A press release distributed earlier by the Government to newsmen announced in part that at 1:20 P.M.: "In a spectacular thrust at the extensive gambling activities in this area, 75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments, arresting approximately 45 persons engaged in such gambling activities as policy numbers and betting on horse races and other sports events, in violation of the Federal wagering tax laws. . . . The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate." The release

mentioned no names except for saying that appellants were charged with conspiracy, as well as with the two substantive counts employed against most other defendants, and [fol. 23] that Costello, Marchetti and a third man had bail fixed at $10,000, $5,000 and $5,000, respectively, while the figure for the other defendants was $2,500. The Government took the newsmen to the I. R. S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Assistant United States Attorney Owens to the effect that the Government had "broken the back of gambling" in Bridgeport, that funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation.

The last statement was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance and this had been denied, and examination of the jurors had revealed recollection of these charges. *Marshall* v. *United States*, 360 U. S. 310 (1959); *United States ex rel. Brown* v. *Smith*, 306 F. 2d 596, 603 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963); see *Beck* v. *Washington*, 369 U. S. 541, 555-58 (1962). But appellants did not meet these essential conditions. Being put to plea in New Haven, trial counsel for Costello and Gjanci sought trial in Bridgeport where the publicity had peaked, Marchetti did not object, and no motion for a continuance was made. When the judge examined prospective jurors on November 30, only three of the panel said they had read or heard about the cases, and none of them were chosen. The attack because of the publicity here described came only in a motion in arrest

[fol. 24] of judgment after the verdict. This was too late; counsel could not speculate on a favorable verdict and then claim lack of "an impartial jury" when the gamble failed.

Although another episode as to publicity was properly raised, the objection fails on the merits. On December 3, the first day of actual trial, defense counsel, out of the jury's presence, moved for a mistrial because of an article in the Bridgeport Post of December 1 which reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that Owens said he expected others to change their pleas to guilty. At the request of the United States Attorney and with the consent of defense counsel, the court asked the jury, most of whom came from the New Haven area, whether any of them had read anything about the case or related cases since their selection as jurors. None responded, and the motion was denied. Appellants say the jurors' silence did not necessarily reflect the truth since the jurors would not be likely to admit they had violated the judge's previous instructions not to read about the gambling prosecutions. Whatever the force of such a contention might or might not be where publicity subsequent to the selection of the jury could be seriously prejudicial, cf. *United States* v. *Agueci*, 310 F. 2d 817, 831-33 (2 Cir. 1962), cert. denied, 372 U. S. 959 (1963), and cases there discussed, the December 1 article contained nothing that could deprive appellants of a fair trial. If one of appellants had pleaded guilty during the trial, the jury could have been so informed under proper caution. *United States* v. *Crosby*, 294 F. 2d 928, 948 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962); *United States* v. *Dardi*, 330 F. 2d 316, 332-33 (2 Cir.), cert. denied, 379 U. S. 845 (1964). In the light of that principle it is impossible to see what prejudice could result from a prediction that [fol. 25] other defendants, with no relation to appellants save having been seized in the raids of October 8, might change their not-guilty pleas.

III.

Ripa's testimony was received over a chorus of objections on the score of the hearsay rule. Whenever he testified as to a transaction or communication with one of the appellants, the others would object to its reception against them as hearsay; when he testified as to transactions or communications with other persons at the instance of one or more of the appellants, all three would object on that ground to its admission against any who were not present.

The objections betray a clear although common misconception of the nature of the hearsay rule. Only in a few instances was Ripa's testimony of declarations from which the jury was to accept the truth of the matter asserted, such as Gjanci's statement that Marchetti and Costello were his bosses. The basis for an objection in other cases, e.g., by Gjanci to testimony that Ripa had placed bets with Marchetti or with "Tony," is not at all that this is hearsay; the testimony of Ripa—himself on the stand subject to cross-examination—chiefly described acts, and no out-of-court utterance of Ripa, Marchetti or "Tony" was being offered to prove the truth of anything asserted in such utterance, 6 Wigmore, Evidence §1766 (3d ed. 1940); *Aikins* v. *United States*, 282 F. 2d 53, 57 (10 Cir. 1960); *United States* v. *Annunziato*, 293 F. 2d 373, 376-77 (2 Cir.), cert. denied, 368 U. S. 919 (1961). The proper objection is that, without more, Ripa's story as to a transaction with one person would not be relevant to prove the crime charged against another.

As the Supreme Court made clear in *Lutwak* v. *United States*, 344 U. S. 604, 617-19 (1953), there is a distinction [fol. 26] between acts and declarations with respect to admissibility. Out-of-court declarations of an alleged conspirator introduced to prove the truth of the matter asserted meet the obstacle of the hearsay rule; while always receivable against the declarant as an admission, they can be used against others, unless some other exception applies, only on independent proof of agency, see 4 Wigmore, *supra*,

§1079, and the agency does not go beyond statements in furtherance of the conspiracy.[2] Evidence of an act (or a statement offered other than for its truth) has no special evidentiary hurdle to overcome and, whether the act is by a co-conspirator or third person and whether it occurs during the period of a conspiracy or not, the evidence is admissible so long as the act is probative of a crime charged against a defendant and the evidence is not excludable on some special ground.[3] Thus, the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with [fol. 27] which he is to be linked by quite separate proof. An act of any other conspirator during the alleged conspiracy and in furtherance of it almost inevitably meets this test, and, as held in *Lutwak*, acts by such others even before or after the period of the conspiracy may still be relevant in suggesting its existence and its aims. See

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[2] Since by hypothesis the conspiracy and defendant's participation must be independently established before the hearsay may be used against him, one may wonder at first blush what role remains for the declaration. Making this point, Judge L. Hand in *United States* v. *Dennis*, 183 F. 2d 201, 230-31 (2 Cir. 1950) (dictum), aff'd, 341 U. S. 494 (1951), suggested that the conspiracy and participation questions be independently decided by the trial judge and the hearsay then given to the jury without limitation. But even if the judge, as in the *Dennis* trial and in the present case, charges that the jury must itself resolve this "preliminary" question beyond a reasonable doubt, the hearsay may still be useful to the prosecution, for example to characterize the conspiracy as to purpose or date, or as evidence that defendant engaged in another crime for which he is on trial. See generally McCormick, Evidence §245, at 522 n. 33 (1954).

[3] Paralleling the hearsay exception in evidence law—indeed, its very foundation in Wigmore's view, 4 Wigmore, *supra*, §1079, at 127-31—is the debated contention that a defendant will be liable for the substantive crime of another upon independent proof that the actor was furthering a conspiracy in which defendant was a member. See Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 993-1000 (1959). No such instruction was given in this case.

United States v. *Ross*, 321 F. 2d 61, 68-69 (2 Cir.), cert. denied, 375 U. S. 894 (1963).[4]

Subject to a general point made by Costello which we will mention below, this discussion suffices to dispose of the objections of Marchetti and Costello to the admission of Ripa's testimony as to the placing of bets with Gjanci between July 23 and 31, on the ground that the court had ruled only that a sufficient showing of conspiracy had been made for the period beginning August 12.[5] Even more clearly it disposes of the objection of each appellant to testimony as to conversations and transactions between Ripa and other appellants and non-parties after August 12. Ripa's testimony that Marchetti had called "Tony" and [fol. 28] arranged for Ripa to book with "Tony," with Ripa to settle up with him once a week, was plainly admissible against Marchetti and also against the other appellants so far as it might prove Marchetti engaged in a gambling conspiracy to which they might independently be linked. Gjanci's instructions that Ripa should bet with "Carl" and settle with him were admissible on the same basis. Once

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[4] The briefs exhibit a common confusion in contending that evidence meeting the standard we have indicated would be admissible only under the conspiracy count; such evidence is admissible on substantive counts even when there is no conspiracy indictment at all. *United States* v. *Pugliese*, 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Annunziato*, *supra*, 293 F. 2d at 378; *United States* v. *Smith*, 343 F. 2d 847 (6 Cir. 1965).

[5] We note also that although at the time of the admission of this evidence the court may have been satisfied only as to a conspiracy beginning August 12, other competent evidence later introduced warranted a finding that the conspiracy had existed from July 23 and, indeed, long before. Cf. *United States* v. *Dennis*, *supra*, 183 F. 2d at 231. The comments in the text and in this footnote apply also to the objection that the court allowed testimony as to acts subsequent to October 2, the last date to which the judge, in his initial ruling, had found the conspiracy extended. And there is nothing to Costello's special objection to the admission of evidence relating to acts on October 7, the day after the indictment had been found; the impounded indictment did not end the conspiracy, as the evidence obtained in the October 8 raids demonstrated.

evidence of these instructions by Marchetti and Gjanci was admitted against appellants, Ripa's testimony that he had then placed bets with Tony and Carl was highly relevant; evidence that the names or telephone numbers led to a gambling enterprise tended to show that the man furnishing the information—and his independently linked co-conspirators—were part of that enterprise. Ripa, in the course of describing his transactions with the appellants and Tony and Carl, naturally told the jury what he himself said or did during the encounters, but this was not to charge his own behavior or statements to the conspirators but simply to provide the necessary context for understanding their conduct which he was relating. *United States* v. *Morello*, 250 F. 2d 631, 634 (2 Cir. 1957), relied on by appellants, simply held that an out-of-court declaration by an undercover agent acting as a conspirator could not be received against co-conspirators as their admission under the conspiracy exception to the hearsay rule. But as *Morello* itself indicated, the *act* of a co-conspirator was admissible for whatever it was worth against the defendants, although occurring outside their presence and without their knowledge, so long as their participation in the conspiracy was proved by independent evidence; and the undercover agent's description of his own conduct, apart from the use of his out-of-court statements for their truth, received no censure. 250 F. 2d at 634-35.

[fol. 29] Costello argues there was no sufficient independent evidence to connect him with the conspiracy, stressing that Ripa did not meet him until September 14. However, Ripa's testimony as to what Costello said and did on that occasion and later amply justified a finding that Costello was one of the "bosses" and had been so from the outset. With the declarations of Gjanci as to Costello's role thus made competent, the contention that the Government failed to adduce sufficient evidence to warrant submission of Costello's case to the jury falls by the wayside.

A final objection relates to oral and written post-arrest statements by Marchetti, discussed in another context be-

low. These were offered and received only against him. In his charge the judge said that the oral statements were received only against Marchetti, but that the written statement was received against all defendants in the conspiracy case although not in the substantive cases other than Marchetti's. No exception to the erroneous instruction was taken. It is plain that if one had been, the judge would have corrected his mistake. For reasons fully explained in *United States* v. *Kahaner,* 317 F. 2d 459, 478-79 (2 Cir.), cert. denied, 375 U. S. 836 (1963), we decline to notice the point.

IV.

As just indicated, Marchetti was interrogated after arrest by a Special Agent, who recorded his oral answers on a question sheet which Marchetti then signed. Apparently Marchetti was first warned of his right not to answer any questions but not of any right to confer with counsel. The agent's testimony and the question sheet were received in evidence against Marchetti without objection. After warning of his right not to answer questions that would incriminate him under federal law, another agent asked Gjanci if [fol. 30] he had a federal tax stamp and, this being answered in the negative, why not; Gjanci replied that he didn't accept wagers but "just play[ed] the numbers." No objection to this testimony was made.

Marchetti and Gjanci now urge that reception of this evidence violated their rights under the Assistance of Counsel clause of the Sixth Amendment as interpreted in *Massiah* v. *United States,* 377 U. S. 201 (1964), and *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and under F. R. Cr. P. 5(a) as implemented by *McNabb* v. *United States,* 318 U. S. 332 (1943), and *Mallory* v. *United States,* 354 U. S. 449 (1957). The Government contends, *inter alia,* that Gjanci's statement was exculpatory (save as to his stipulated failure to have a tax stamp) and that Marchetti's failure to object was deliberate, since, there being overwhelming proof against him, his sole objective was to pro-

tect Costello, as the statement did. We find it unnecessary to examine these contentions. We held some years ago that we need not consider *McNabb-Mallory* objections not clearly made at trial, *United States* v. *Ladson*, 294 F. 2d 535, 538-39 (2 Cir. 1961), cert. denied, 369 U. S. 824 (1962). In the course of its *in banc* consideration of a number of cases involving *Massiah* and *Escobedo* claims arising out of trials after those decisions, the court has reached the same general conclusion, *United States* v. *Indiviglio*, —— F. 2d —— (1965), and we find no special circumstances warranting different action here.

We have carefully examined appellants' other claims of error but do not consider them to require discussion. The Court is indebted to Carroll W. Brewster and Kimberly B. Cheney, assigned counsel, for their presentation on Gjanci's behalf.

Affirmed.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Henry J. Friendly, Hon. J. Joseph Smith, *Circuit Judges.*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI, ARTHUR GJANCI, Defendants-Appellants.

Appeal from the United States District Court for the District of Connecticut.

JUDGMENT—October 29, 1965

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 31a] [File endorsement omitted]

[fol. 32]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Henry J. Friendly, Hon. J. Joseph Smith, *Circuit Judges.*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

FRANK COSTELLO, Defendant-Appellant.

Appeal from the United States District Court for the District of Connecticut.

JUDGMENT—October 29, 1965

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 32a] [File endorsement omitted]

[fol. 33]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Henry J. Friendly, Hon. J. Joseph Smith, *Circuit Judges.*

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

FRANK COSTELLO, JAMES "TOTTO" MARCHETTI, ARTHUR GJANCI, Defendants-Appellants.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

FRANK COSTELLO, Defendant-Appellant.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

JAMES "TOTTO" MARCHETTI, Defendant-Appellant.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ARTHUR GJANCI, Defendant-Appellant.

ORDER DENYING REHEARING—November 26, 1965

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 33a] [File endorsement omitted]

[fol. 34]

SUPREME COURT OF THE UNITED STATES

No. 826, October Term, 1965

FRANK COSTELLO, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 21, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, limited to Question 1 presented by the petition which reads as follows:

"1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in Albertson vs. Subversive Activities Control Board, —— U.S. —— (1965), overrule United States vs. Kahriger, 345 U.S. 22 (1953) and Lewis vs. United States, 348 U.S. 419 (1955)?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
DEC 16 1965
JOHN F. DAVIS, CLERK

In the

Superior Court of the United States

OCTOBER TERM, 1965

No. ~~826~~ 443

FRANK COSTELLO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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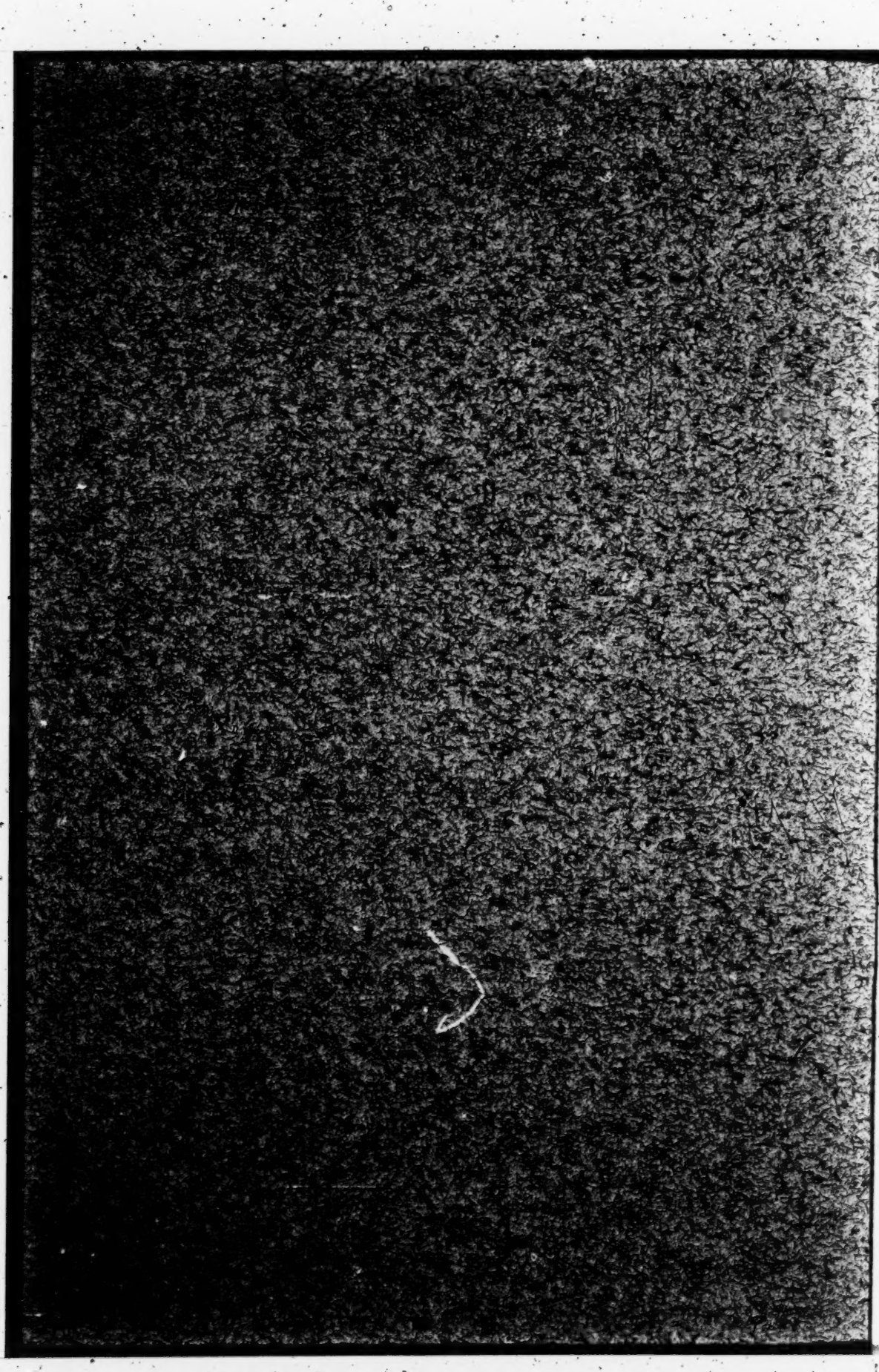

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In the

Superior Court of the United States

OCTOBER TERM, 1965

No.

FRANK COSTELLO
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, The Chief Justice, And The Associate Justices Of The Supreme Court Of The United States

The petitioner, Frank Costello, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case, October 29, 1965.

The opinion of the Court of Appeals (Waterman, Friendly and Smith, Circuit Judges) is thus far unreported and is reprinted in the Joint Appendix to Petitions for Petitioners Marchetti and Costello beginning on Page 1 thereof. Petition for rehearing was denied without lengthy opinion, but the court referred therein to its opinion, of date November 26, 1965, in *United States vs. Alfred Grassia,* which

is also reprinted at page 24a of the above mentioned joint appendix. There was no written opinion filed in connection with the district court proceedings.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

STATEMENT OF THE CASE

Petitioner Costello here seeks relief from the action of the Court of Appeals in affirming judgment of the United States District Court for the District of Connecticut in two separate actions. In one, Costello was charged, along with petitioners James Marchetti and Carl Gjanci, with having conspired wilfully to fail to pay, in violation of 26 U. S. C. Sec. 7203, the special occupational tax imposed by 26 U. S. C. Sec. 4411 upon those engaged in the business of accepting wagers, for themselves or for others. In a separate indictment, Costello was charged substantively, in two counts, with having violated 26 U. S. C. Sec. 7203: (1) in failing to pay the special occupational tax required by 26 U. S. C. Sec. 4411, and (2) in failing to register as required by 26 U. S. C. Sec. 4412. Marchetti and Gjanci were similarly accused of the substantive offenses in separate indictments. The four indictments against the three defendants were ordered consolidated, upon motions of the goverment, (A. 30a)* for trial before a single jury presided over by Chief Judge Timbers. All points raised herein apply equally to Costello's convictions on both indictments and no further differentiation between them will be made.

On December 14, 1964, a jury found all three defendants guilty and Chief Judge Timbers, on January 11, 1965 sentenced Costello to serve one year in prison and pay a fine of $10,000.00, plus a suspended sentence and probation on one of the substantive counts.

Appeal was taken to the Court of Appeals for the Second Circuit; that court, on October 29, 1965, affirmed the convictions. A petition

* The symbol A. plus a page reference refers to the joint appendix of appendix of appellants Costello and Marchetti in the Court of Appeals. A page reference without any preceding symbol refers to the appendix of those two petitioners in this court.

for stay of mandate was filed with the Court of Appeals, which petition was granted, for a period of thirty days, on November 17, 1965. Meanwhile, on November 15, 1965, the date of this court's ruling in the case of *Albertson, et al vs. Subversive Activities Control Board* ——— U. S. ———, 34 L.W. 4014 (1965), a petition for rehearing was delivered to the Court of Appeals. On November 17th, Judge Waterman granted leave to file the petition, but on November 26th, the court denied rehearing.

QUESTIONS PRESENTED

1. Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson vs. Subversive Activities Control Board* ——— U. S. ——— (1965), overrule *United States vs. Kahriger*, 345 U. S. 22 (1953) and *Lewis vs. United States*, 348 U. S. 419 (1955)?

2. Where the sole object of these prosecutions—proudly announced by the United States Attorney's office, clearly recognized and so applied by the trial and sentencing judge—was to crack down on the state offense of gambling, have not these federal occupational tax provisions been enforced in a manner violative of the Tenth Amendment?

3. Does not the conscious generation of publicity, of an extremely sensational and prejudicial nature, by the office of the United States Attorney, deny to an accused the right guaranteed by the Sixth Amendment to the Constitution of the United States to a "speedy and public trial, by an impartial jury" and amount to a denial of liberty without due process of law in violation of the Fifth Amendment?

REASONS FOR ALLOWANCE OF THE WRIT

STATEMENT OF RELEVANT FACTS AND PROCEEDINGS

The petitioner Frank Costello, with more than forty others similarly charged, was arrested on the afternoon of October 8, 1964 in Bridgeport, Connecticut. Most of those arrested had been indicted on

October 6th, at which time the indictments were ordered impounded by the court. (A. la, A. 99a)

The actual arrests were made amidst fantistic trumpeting and braying by the office of the United States Attorney. Even prior to 2:36 P.M., October 8, 1965, when the court vacated the impounding order, (A. 18a) the Government had gathered reporters at a private law office in Bridgeport; (A. 78a, A. 155a) later, they were taken to the headquarters of the Internal Revenue Service where they could conveniently photograph those arrested as they were brought in (A. 149a, A. 151a, A. 155a). *The Bridgeport Post* of October 8, 1964, printed banner headlines and an extensive article proclaiming the arrests before some defendants were actually arrested (A. 77a, A. 85a, A. 87a); all of the news media—newspapers, radio and television—were saturated with details of the raids and individuals involved. (A. 77a-78a, A. 145a-160a) At or before the time many or most of the defendants were arrested, the Government distributed to the press a prepared statement marked, "FOR IMMEDIATE RELEASE"; "U. S. TREASURY AGENTS STAGE MASSIVE RAIDS" (A. 78a-79a)

No less shocking than the Government's conscious build up to fever pitch of the publicity was the *type of information* given to the Fourth Estate. The original press release ranged from giving "testimony" as to one of the necessary elements of the case ("United States Attorney Eagan noted that not one individual in the Bridgeport area currently holds an occupational tax stamp") to the making of totally extraneous but highly prejudicial statements. ("The special agents were successful in breaking up a large, syndicated operation including some of the most important higher-ups in the gambling syndicate"). (A. 78a) In the days that followed, the Government continued in the same tenor—with the same fervor. The following are only a few of the more shocking examples:

> "Mr. Owens today said funds from the gambling operation in Bridgeport were supporting 'prostitution and skylocking.'"
>
> *The Bridgeport Post,* Oct. 9, 1964, p. 1 (A. 80a, A. 153a)

> "Mr. Owens said Costello and Marchetti have previous convictions for income tax violations."
>
> *The Bridgeport Post,* Oct. 9, 1964, p. 1 (A. 80a, A. 153a)

" 'Thank God, you finally broke it up—my husband's gambling has ruined our home!'

This remark was one of more than a dozen emotional expressions of gratitude voiced by housewives who contacted Howard T. Owens, Jr., chief assistant U. S. attorney in the wake of the gambling raids by Treasury agents and State police on Thursday.

'Some of the women even cried as they told me how gambling by their husbands had caused them continuous hardship' Mr. Owens said.".

The Bridgeport Post, Oct. 10, 1964, p. 1 (A. 81a, A. 157a)

Also among those arrested, Mr. Owens said, were men believed to be the 'key' men in the local syndicate.

Mr. Owens declined to say whether all of the 45 persons arrested were members of the syndicate.

The Bridgeport Post, Oct. 10, 1964, p. 1 (A. 81a, A. 157a)

A jury was impaneled in the instant case on November 30, 1964 and the evidentiary portion of the case was to begin a few days later, on December 2nd after the impaneling of other juries. In the interim, *The Bridgeport Post* on the evening before petitioner's trial was to start, carried a story on its first page reporting that six other defendants had pleaded guilty, and quoted chief assistant U. S. Attorney Owens as having said, ". . . the government expects others to change their pleas to 'guilty'." (A. 141a).

On the basis of this publicity, and citing the court to the earlier publicity at the time of the raids, petitioner's trial counsel moved for a mistrial and change of venue, which motions were denied by the court. (A. 5a, A. 100a-101a, A. 207a-217a).

After an eight day trial, the jury found all three defendants guilty. After conviction, counsel filed motions for Acquittal and for a New Trial—and in Arrest of Judgment, raising all the questions here presented. (A. 11a, A. 105a, A. 57a-88a) On January 11, 1965, before imposing sentence, the court denied all motions on their merits. (A. 342a) Before passing on to sentencing, Judge Timbers, who had presided over all stages of the proceedings, announced, in part, concerning these "tax prosecutions":

"While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.

While it is perfectly true, and no one knows better than the Court, that the charge against these defendants was not that of gambling, it is equally true that the prosecutions never would have been brought and there never would have been convictions but for extensive gambling and accepting of wagers as demonstrated by the evidence.

As this Court has observed before, one of the handmaidens of vice in any community—here graphically demonstrated in the Bridgeport community—one of the handmaidens of vice is that of gambling. The other two, with which this Court has dealt severely and will continue to deal severely, are those of narcotics and prostitution. Of course it is well known that the revenue from gambling is the financial basis or keystone upon which much of crime is built.

The Court does not intend, in imposing sentence here, to deal out the slap on the wrist which has characterized sentences imposed by the State Courts for violations of the State gambling laws. . . ." (A. 344a-345a)

THE WAGERING TAX STAMP PROVISIONS VIOLATE PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION

Shortly after passage of the "revenue" legislation here under attack, this Court in *United States vs. Kahriger,* 345 U. S. 22 (1953) and in *Lewis vs. United States,* 348 U. S. 419 (1955) sustained the validity of these statutes as against a claim they were violative of the Fifth Amendment privilege against self-incrimination. At that time, Mr. Justice Black, one of three dissenters, commented:

"If this would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would."

Lewis vs. United States, supra, at 425.

Now, a decade later, we would strongly urge the Court to take a second searching look at the privilege—this statutory and regulatory scheme—and at its decisions in *Kahriger* and *Lewis*.

Among the questions which must be answered by a registrant, as contained in the Special Tax Return And Application For Registry—Wagering (Internal Revenue Service Form 11-c) (A. 73a) are the following:

> "5. Are you engaged in the business of accepting wagers on your own account?
>
> "If yes . . . give
>
> "(a) Name and address where each such business is conducted . . .
>
> "6. Do you receive wagers for or on behalf of some other person or persons?
>
> "If yes, give true name and address of each such person." (A. 73a.)

The incriminatory nature of these questions would seem clear. The court's reasoning in *Kahriger* and *Lewis*—that registration and purchase of the stamp *only* indicates an intention to carry on such activities in the "future"—is difficult or impossible to justify in view of the contents of the required return.

In the last few years, the Fifth Amendment privilege, reflecting our "most noble aspirations," has been given full rather than grudging application. *Murphy vs. Waterfront Commission*, 378 U. S. 52, 55 (1964); *Malloy vs. Hogan*, 378 U. S. 1 (1964). Now, mere scant weeks ago, this Court unanimously held unconstitutional strikingly similar provisions of the Subversive Activities Control Act of 1950. *Albertson vs. Subversive Activities Control Board* —— U. S. ——, 34 L. W. 4014 (1965). Counsel has read and re-read *Albertson* and can see no reasonable ground upon which to hold otherwise as to the wagering occupational registration requirements.

In denying petitioner's request for rehearing, the Court of Appeals referred to its decision in *Grassia vs. United States*, —— F. 2d —— (1965), decided the same day:

> "Recognizing that the rationale of *Albertson* v. *Subversion Activities Control Board*, —— U. S. —— (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to

overrule its previous decisions in *United States* v. *Kahriger*, 345 U. S. 22 (1953), and *Lewis* v. *United States*, 438 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination." (26a)

It is humbly submitted that this Court ought now resolve for the lower courts this seeming direct conflict between its earlier decisions on the wagering tax stamp and the recent unanimous decision in *Albertson*.

AS APPLIED IN THESE PROSECUTIONS AT LEAST THE WAGERING TAX STATUTES VIOLATE THE TENTH AMENDMENT

In *Kahriger* this Court also held that Congress, in passing the here challenged legislation, ostensibly a revenue measure, had not violated the Tenth Amendment, although Mr. Justice Frankfurter strongly dissented, branding the revenue label "verbal cellophone." *United States vs. Kahriger*, 345 U. S. at 38. Later, in *United States vs. Calamero*, 354 U. S. 351 (1957), the Court indicated that it could not peek through that cellophane to any other possible Congressional motive lest the constitutionality of the legislation be placed in doubt. 354 U. S. 351 at 358. In this case we have seen the complete rending and discarding of the cellophane.

The application and enforcement of a federal statute—constitutionally sound on its face—can result in a constitutional denial. *Yick Wo vs. Hopkins*, 118 U. S. 356 (1885); *Snowden vs. Hughes*, 321 U. S. 1 (1943). Here, the actions and statements of both the Government and the court make it clear that these particular federal prosecutions were conceived, planned and carried forth—and that the petitioners were convicted and punished—only for the crime of "gambling," in direct violation of the Tenth Amendment.

In earlier portions of this petition, counsel has set forth only fragments of the statements made before, during and after these prosecutions by both the office of the United Sates Attorney and by Chief Judge Timbers of the United States District Court for the Disrict of Connecticut. For the Court fully to grasp the thrust of these

prosecutions, and the full flavor of the actions of both the Justice Department and the trial court, petitioner would ask the Court to read a bit more extensively in appelants' appendix below. (A. 70a-71a, A. 79a-82a, A. 176a-186a, A. 344a-346a)

The responsible federal officials in Connecticut, both prosecutorial and judicial, have done exactly what this court held, in *Calamero*, may not be done. These particular prosecutions, openly and notoriously, were conducted for the purpose of destroying gambling in Connecticut—in the stated hope of drying up the source of revenue which was the *only* permissible justification for the very congressional authority relied upon. Under these circumstances, the use of the statute violated the Tenth Amendment.

THE DELIBERATELY GENERATED PREJUDICIAL PUBLICITY VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS

Petitioner has earlier set forth the general outlines of the publicity campaign here carried out by the Government. A huge bally-hoo atmosphere created at the "kickoff" of these prosecutions was supplemented as the days went on by the feeding to the press of a mass of extraneous, improper and highly prejudicial statements.

As this court well knows, the accommodation of a free press with the necessity of insuring a fair trial is a particularly knotty problem. *Irvin* v. *Dowd*, 366 U. S. 717 (1961). Here, however, we deal not with that accommodation, but rather with deliberate and conscious generation of prejudicial publicity by the Government. From time to time this court has had to set certain limits on prosecutorial conduct; *Berger vs. United States*, 295 U. S. 78 (1935); we would submit that such a time is again at hand.

CONCLUSION

1. Each of the questions presented herein poses important questions of federal criminal law which should be decided by this Court.

2. The *Albertson* decision *at least* raises serious doubts as to the present viability of *Kahriger*, *Lewis* and the wagering tax statutes, and this Court should now furnish guidance to the lower federal courts.

3. In its supervisory role over the administration of federal criminal justice and procedure, this Court should define the permissible limits of prosecutorial conduct regarding the deliberate generation of prejudicial publicity.

The writ of certiorari should be granted.

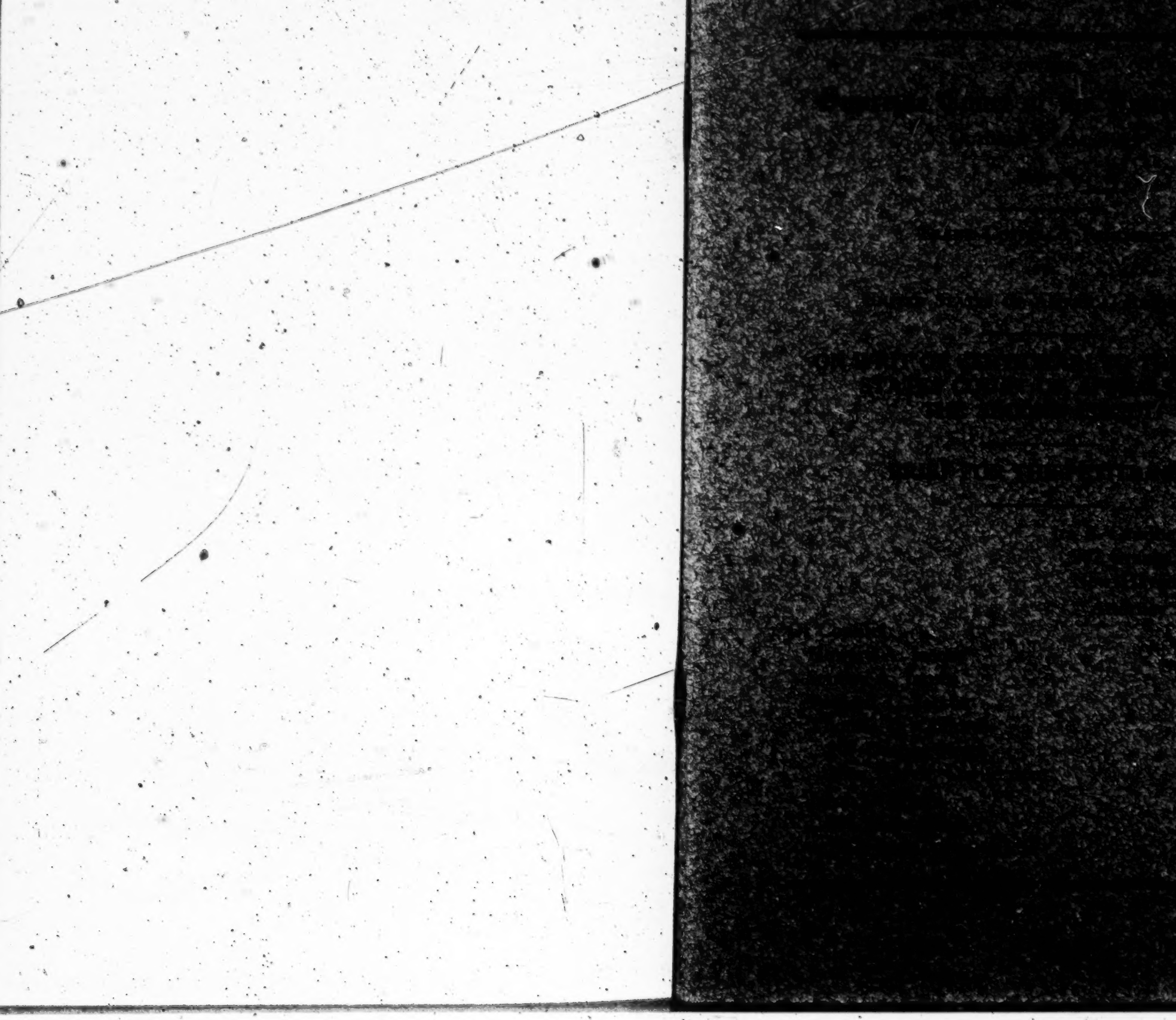
Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the cases numbered and entitled in its docket No. 29524, *"United States of America vs. Frank Costello, et al,"* and No. 29525, *"United States of America vs. Frank Costello,"* and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated this 13th day of December, 1965.

FRANK COSTELLO
Petitioner

By IRA B. GRUDBERG, Esq.
Attorney for Petitioner

HOWARD A. JACOBS, Esq.
With him on the Petition



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 41

FRANK COSTELLO, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

STATEMENT OF THE CASE

On October 6, 1964, a federal grand jury convened for the United States District Court for the District of Connecticut returned two indictments against the Petitioner Frank Costello. In the first, he was charged, along with two others,[1] with having conspired to violate 26 U. S. C. §7203 by not paying the special wagering occupational tax imposed by 26 U. S. C. §4411. (R. 1). In the other indictment, Costello was charged, in two substantive counts, with having violated Section 7203 by engaging in the business of receiving wagers having "wilfully failed prior" (1). to pay

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[1] James Marchetti and Carl Gjanci, whose petitions for *certiorari* are presently pending before, and awaiting action by, this Court.

the "special occupational tax" required by 26 U. S. C. 4411, and (2) to "register" as required by 26 U. S. C. 4412. (R. 3) The two alleged co-conspirators were similarly charged in separate indictments, and all charges were consolidated, upon motion of the government, for a single trial.

After a jury verdict of guilty, Costello and the other accused filed timely motions in Arrest of Judgment and to Dismiss Indictment raising the claim that the occupational tax and registration provisions were violative of the Fifth Amendment protection against self-incrimination. (R. 5-9) The trial court denied the motions and, on January 11, 1965, ordered Petitioner imprisoned for one year and imposed a fine of Ten Thousand ($10,000.00) Dollars. (R. 9-12)

Petitioner appealed to the Court of Appeals for the Second Circuit; that court, on October 29, 1965, affirmed the District Court judgment. Immediately after this Court decided *Albertson v. Subversive Activities Control Board,* 382 U. S. 70 (1965), Petitioner asked the Court of Appeals to rehear the self-incrimination aspect of the case, but the court declined, noting by reference that while "the rationale of *Albertson* . . . may lead the Supreme Court to overrule its previous decisions in . . . *Kahriger* . . . and . . . *Lewis,* insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination."

Costello filed his Petition for Certiorari on December 16, 1965; the Court, on March 21, 1966, granted the petition limited to the single question of whether this court should overrule its earlier holdings, in *Kahriger* and *Lewis,* that the federal wagering tax statutes do not violate the Fifth Amendment's privilege against self-incrimination.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, on October 29, 1965, affirming petitioner's conviction appears as *United States v. Costello,* 352 F. 2d 848 (2 Cir. 1965). The Court of Appeals also, on November 26, 1965, denied Costello's petition for rehearing without opinion, but referred therein to its opinion in *United States v. Grassia,* 354 F. 2d 27 (2 Cir. 1965). That opinion, in relevant part, is reprinted in Appendix A, *infra.*

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1254 (1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This appeal involves the Fifth Amendment, United States Constitution; Title 26 U.S.C. §§ 4401 through 4423, 4901, 6011 and 7203. Also involved are numerous Connecticut statutes proscribing various forms of gambling activity. All of the federal statutes and a representative selection of the Connecticut statutes are reprinted in Appendix B, *infra.*

QUESTION PRESENTED

"Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson* vs. *Subversive Activities Control Board* 382 U.S. 70 (1965), overrule *United States* v. *Kahriger,* 345 U.S. 22 (1953) and *Lewis* vs. *United States,* 348 U.S. 419 (1955)?"

SUMMARY OF AGREEMENT

The federal wagering tax laws are a well integrated series of statutes. They provide not only for registration and payment of a "special tax" prior to entering the business of gambling, but also for compulsory answers to questions concerning present and past behavior, criminal under the law of almost all states, later supplemental reporting highly incriminating in nature, and the exposing of books and records to the Internal Revenue Service.

The prior decisions of this Court, in *United States v. Kahriger,* 345 U. S. 22 (1953) and *Lewis v. United States,* 348 U. S. 419 (1955) looked almost solely to the condition precedent requirement of the special tax to the exclusion of the more obviously incriminating aspects of the legislation and Internal Revenue form. The Court also defined the protection afforded by the privilege in an unduly restrictive manner.

The recent decision in *Albertson v. Subversive Activities Control Board,* 382 U. S. 70 (1965) virtually demands reversal here, and overruling of *Kahriger* and *Lewis.* Petitioner clearly has standing to raise the privilege without having filled out the registration form, as this area of regulation is one "permeated by criminal statutes." The approach of the *Albertson* Court in looking to the actual content of the registration form leads to the inescapable conclusion that compliance with 26 U. S. C. §§ 4411 and 4412 tends to incriminate the registrant concerning past conduct. Even if the plain language of the registration form is ignored, and registration is deemed totally prospective, required statements as to "future intent" would nonetheless tend to incriminate the taxpayer as to past acts.

The privilege, when disclosures are compelled in an area where all activity is criminal, should not be limited only

to past acts. The *Kahriger* Court's reliance upon Wigmore in stating such a principle was misplaced. Such a rule, if exploited by cleverly drawn legislation, as is here before the Court, would lead to total emasculation of the privilege. For instance, there is no conceivable purpose served by the "condition precedent" aspect of this legislation other than subversion of the privilege—which has been singularly successful thus far.

There is no question that, even assuming existing law would be correct in a vacuum, it has in fact been used to convict people of criminal acts by use of information forced from them under threat of criminal sanction. Such a result represents an eroding away of the precious privilege; that erosion should continue no longer.

ARGUMENT

I. THE REGULATORY FRAMEWORK OF THE WAGERING TAX STATUTES

Petitioner presently stands convicted, on both substantive and conspiracy charges, of having violated 26 U.S.C. §7203, a general penalty statute, which makes it a crime wilfully to fail to pay any tax imposed by Congress in Title 26, or wilfully to fail to "make any return . . . keep any records, or supply any information . . . required by law. . . ." In this case, of course, the indictment charged specifically an alleged failure to comply with a number of sections of Chapter 35 of the Internal Revenue Code, "Taxes on Wagering."

Although, in *United States v. Kahriger,* 345 U.S. 22 (1953), this Court upheld the wagering tax provisions against an argument that Congress had unconstitutionally used the taxing power to regulate conduct subject solely to state control, it was conceded that the taxes involved have

"a regulatory effect" and doubtless act to "discourage or deter" gambling activity. 345 U.S. 22, at 28. To understand the impact of the wagering tax provisions upon the Fifth Amendment's privilege against self-incrimination, we must examine Chapter 35 as a single integrated unit, and view the individual statutory provisions taking into consideration their relationship with each other.

Section 4401 of Title 26 imposes an excise tax of 10 percent on all wagers (save for certain betting transactions exempted by 4402) which tax must be paid by "each person who is engaged in the business of accepting wagers" and by "each person who conducts any wagering pool or lottery". In addition to the excise tax on the actual wagers, Section 4411 imposes a "special tax of $50.00 per year to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable". The special tax must be paid before the gambler goes into business. 26 U.S.C. §4901. Hand in hand with the "special tax" is the registration provision of 4412 requiring any person liable to pay the $50.00 also to provide the Internal Revenue Service with certain details of his "operations". Section 4412 has been implemented by Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry, which, after demanding an answer to the query, "Are you engaged in the business of accepting wagers on your own account?", continues to elicit detailed information as to the people with whom the taxpayer-registrant is doing business. (R. 7)[2]

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[2] See *United States v. Whiting*, 311 F.2d 191 (4 Cir. 1962) where the I.R.S. refused to issue an "occupational tax stamp" when the taxpayer tendered the $50.00 "special tax" but failed to execute a registration statement, and *United States* v. *Mungiole*, 233 F.2d 205 (3 Cir. 1956) where a tender of the tax, without registration, was held to be no defense to a subsequent prosecution for failing to pay the tax.

Section 6011 of Title 26 supplies to the Secretary of the Treasury, or his delegate, the authority to require of any taxpayer, "return[s] or statment[s] according to forms and regulations prescribed" by them. Form 11-C has been so prescribed by the I.R.S. and, in addition to the original registration form, the "taxpayer" must, *within 10 days after starting to do business* with a new employee or employer, file a "Supplemental" Form 11-C reporting that information. 26 C.F.R. §44.4412-1.

The *active* registration requirements of Chapter 35 far from exhaust its self-incriminating potential; Section 4423 decrees that "the books of account of any person liable for (wagering) tax . . . may be examined and inspected as frequently as may be needful to the enforcement of this chapter". It is clear that, in addition to using information obtained for the purpose of enforcing the tax, the I.R.S. feels it proper and desirable to turn over the same information to local and state law enforcement officials so that the "taxpayer" might be duly convicted on state gambling charges—it has proudly trumpeted that fact. Caplan, The Gambling Business and Federal Taxes, Journal of Crime and Delinquency, Vol. 8 (1962) pg. 697. Against this backdrop of "friendly cooperation", Chapter 35 is then neatly rounded out by Section 4422, in which Congress specifically provides that payment of the wagering tax "shall not exempt any person from any penalty provided by a law of the United States or of any state for engaging in the same activity . . ."

This court, a decade ago, in *United States v. Kahriger, supra* and *Lewis v. United States,* 348 U.S. 419 (1955), held that the foregoing statutory scheme was not violative of the privilege against self-incrimination; we ask the Court now to reconsider those holdings.

II. KAHRIGER AND LEWIS REVISITED

A challenge to the constitutionality of the wagering tax provisions was first brought before this Court in *United States v. Kahriger,* 345 U. S. 22 (1953). There, the major portion of the Court's opinion dealt with defendant's contention that the legislation was not a true exercise of the Congressional taxing power, but rather an illegal attempt to penalize intrastate gambling activity, the regulation of which had been constitutionally left solely to the states. When the Court did pass on to the Fifth Amendment challenge, it disposed of it rather summarily.

First, the majority expressed doubt that the accused had standing to raise the self-incrimination argument. Citing the following language from *United States* vs. *Sullivan,* 274 U.S. 259, at 263, "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all", the Court commented that, in view of the failure of the accused to register at all, "it is difficult to see how he can now *claim the privilege*". 345 U.S. at page 32. (Emphasis added)

The Court continued, without specifically holding that defendant lacked standing to raise the self-incrimination issue, to dispose of the claim on the merits. The majority, in this regard, stated very briefly,

> "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." 345. U.S. at pages 32-3. (Emphasis added)

Two years after *Kahriger,* in *Lewis* vs. *United States,* 348 U.S. 419 (1955), the Court expanded somewhat on its cryptic holding, in *Kahriger,* that a registrant need not "confess" to any crimes—only "fulfill certain conditions" before engaging in wagering. Reading Sections 3271 and 3290[3] of the 1939 Internal Revenue Code in tandem, the Court stated, "it seems clear that payment of the special $50 tax is to be made prior to engaging in the business of accepting wagers." 348 U.S. at page 421.

The Court pointedly stressed the word *compelled* in its definition of the scope of the Fifth Amendment guarantee. 348 U.S. at page 421. Expanding upon that theme, the majority went on to state that the fact that a gambler "may elect to pay the tax *and make the prescribed disclosures required by the Act* is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. . . . The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble." 348 U.S. at page 422.

Passing on, finally, to petitioner's claim that the purchase and required exhibition of the $50 stamp could furnish probable cause for issuance of a search warrant and thereby incriminate him, the Court, without citation of authority, curtly dismissed that contention based upon Lewis' very failure to purchase the stamp and register. "His complaint is that if he had one he might get in trouble. Since petitioner is without a stamp, he is not in a position to raise the

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[3] Sections 4401 and 4901 of the 1954 Code. Section 4901 presently lays out even more specifically than its 1939 precursor the "condition precedent" aspect of the special tax provision.

question as to what might happen to him if he had one." 348 U.S. at page 423.

In summary, the federal wagering tax laws, as preserved from constitutional attack in *Kahriger* and *Lewis,* have stood for a decade and a half on these underpinnings:[4]

1. The Court's holding that an accused, not having purchased a stamp or registered, cannot, in his criminal prosecution therefor "claim the privilege" or point to what might have happened had he complied with the law.

2. The Court's emphasis on the word "compelled" in the Fifth Amendment, and its holding that payment of the tax, the prescribed registration and disclosures are strictly "a matter of . . . choice with nothing compulsory about it". 348 U.S. at page 422.

3. An implication somehow based presumably upon the literal language of the Fifth Amendment, that only *testimonial* compulsion would be violative of the privilege.

4. The holding that, because present section 26 U.S.C. 4901 requires payment of the special tax *before* entering the "business of accepting wagers", all that is required by Chapter 35 is the disclosure of present intent to break the law, in the future, which disclosure, even if "compelled", cannot be deemed incriminating.

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[4] In *Kahriger,* the Court was not completely clear as to whether it was considering alleged self-incrimination under State or other federal laws. The government, however, argued that any possible incrimination would solely be under state law, *United States* v. *Lewis,* 348 U.S. 419, 423, fn. 1, and therefore not protected by the Fifth Amendment. *United States v. Murdock* 284 U.S. 141 (1931). To whatever extent *Murdock* was an implied basis for the *Kahriger* holding, this Court's decision in *Murphy v. Waterfront Commission* 378 U.S. 52 (1964) has undercut it.

We contend that *Kahriger* and *Lewis,* even when decided, were based on an unduly restrictive view of the privilege which this Court has called "an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized'.[5]" *Ullman v. United States,* 350 U.S. 422, 426 (1956). In its decisions of the last decade, however, this Court has made it clear that if the wagering tax statutes "would not violate the Fifth Amendment's privilege against self-incrimination, it is hard to think of anything that would". *United States v. Lewis,* 348 U. S. at page 425 (Black, J., dissenting)

III. THE WAGERING TAX STATUTES VIOLATE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION

A. PETITIONER HERE HAS STANDING TO TO RAISE THE PRIVILEGE

Relying upon *United States v. Sullivan,* 274 U.S. 259 (1927), the Court in *Kahriger* intimated that one accused of criminally having failed to register and pay the special wagering tax could not then "claim the privilege" because of his very failure to comply with the tax and registration requirements; later, in *Lewis,* the Court squarely held that petitioner could not complain of the alleged self-incriminating effects of the legislation because he had, in fact, failed to comply. *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965) has now, however, completely undercut the "no standing" rationale of the earlier wagering tax cases.

In voiding the registration provisions of the Subversive Activities Control Act of 1950, the Court squarely met, and

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[5] Griswold, The Fifth Amendment Today (1955), 7.

disposed of, the government claim, based upon *Sullivan*, that petitioners lacked standing because of their failure to register and invoke the privilege on those specific questions claimed to be incriminating. The Court pointed out that while "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large . . . here they are directed at a highly selective group inherently suspect of criminal activities." The claims of privilege in *Albertson*, unlike *Sullivan*, were "not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioner in the admission of a crucial element of a crime." 382 U.S. at page 79.

The instant case is clearly governed by *Albertson* rather than *Sullivan*. While petitioner has reproduced in his appendix only two of the blunderbuss Connecticut statutes prohibiting wagering and providing criminal penalties, this surely is "an area permeated with criminal statutes". §§53-271 to 53-279, 53-295 to 53-298, 54-197 (Conn.Gen. Stats., 1958 Rev.) An answer to virtually any one of the questions on I.R.S. Form 11-C (R.7) would involve an "admission of a crucial element of a crime". Even payment of the special tax without registration at all, if that could legally be accomplished, might easily be used to incriminate, especially in a conspiracy prosecution. Surely petitioner must have the same standing to challenge the validity of the wagering tax statutes, without first confessing to a crime, as did the alleged Communist Party members in *Albertson*. Cf. *Jones v. United States*, 362 U.S. 257, 258-267 (1960).

B. THE WAGERING TAX PROVISIONS VIOLATE THE FIFTH AMENDMENT PRIVILEGE NOTWITHSTANDING THE STATUTORY REQUIREMENT THAT THE SPECIAL TAX BE PAID BEFORE ENTERING INTO THE BUSINESS OF ACCEPTING WAGERS

In both *Kahriger* and *Lewis*, the Court leaned heavily on the fact that Sections 3290 and 3271 of the 1939 Code required payment of the special $50 tax before venturing into the business of accepting wagers. Centering solely upon this single aspect of the entire group of wagering tax statutes, combined with the brief statement in *Kahriger* that the privilege applied "only to past acts, not to future acts that may or may not be committed", 345 U.S. at page 32, led the court to the conclusion that the privilege had not been violated—that perhaps the "would be gambler . . . may have to give up gambling, but there is no constitutional right to gamble". *United States* v. *Lewis, supra.* at 422; see also dissent of Mr. Justice Black at page 425. We submit that all the Court's premises in the earlier cases—(1) the single minded preoccupation with the condition precedent aspect of the special tax; (2) the conclusion that the payment and registration *must* only relate to future conduct; and (3) the "rule of law" that the privilege *necessarily applies only to past acts*—were wrong.

1. In Measuring The Constitutional Validity Of The Wagering Tax Provisions The Court Must Look To The Entire Statutory Scheme

A reading of *Kahriger* and *Lewis* would almost leave one with the impression that the *only* thing a prospective "taxpayer" need do, under the wagering tax provisions, is pay the special tax of $50 before starting his "business". That of course is not at all what this package of legislation provides. Payment of the special tax is only the first requirement in a compulsory series of steps demanding that the

citizen furnish the sovereign with information with which the sovereign may incriminate and incarcerate the citizen. These statutory and regulatory demands are set forth in detail, *supra,* and little would be served by repeating them here. It is a virtual impossibility, however, for a taxpayer to comply with all the statutory requirements without incriminating himself—as to past and present behavior.[6]

To look only to the special tax provision is to ignore the real violence done to the Fifth Amendment right by the entire legislation. As with the Subversive Activities Control Act, there is nothing in this "Act or regulation (which) permits less than literal and full compliance with the requirements of the form" or other disclosure provisions. *Albertson* v. *Subversive Activities Control Board,* 382 U.S. at 78. The Internal Revenue Service considers the special tax payment and the completion of Form 11-C as inseparable. In *United States* v. *Mungiole,* 233 F.2d 205 (3 Cir. 1956), the accused had tendered the $50 which was refused because, relying upon the privilege, he had refused to register. His subsequent conviction for accepting wagers without payment of the tax was affirmed by the Third Circuit, which held that tender of the tax, without registration, was ineffective. Cf. *United States* v. *Whiting,* 211 F.2d 191 (4 Cir. 1962).

Further, if the cases dealing with the testimonial privilege are a valid guide, the payment of the tax would probably be deemed a waiver of the privilege, *Caminetti* v.

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[6] Where a registration statute calls for information which would be incriminating as to present status or past conduct, the lower courts have had no difficulty with "standing"—and have dismissed prosecutions brought for failure to register. *Russell* v. *United States,* 306 F.2d 402 (9 Cir. 1962); *Dugan* v. *United States,* 341 F.2d 85 (7 Cir. 1965); *United States* v. *Fleish,* 227 F.Supp 967 (E.D. Mich. 1964).

United States, 242 U.S. 470,492-5 (1917), *Raffel* v. *United States,* 271 U.S. 494 (1926), *Rogers* v. *United States,* 340 U.S. 367 (1951), thereby demanding total compliance, the privilege no longer being available, with registration under 4412, with the "open book" provision of 4423, and with the subsequent reporting required by 26 C.F.R. §44.4412-1 (b) (2) and (3).

Although concededly *Albertson* dealt with compelled disclosures which could more clearly incriminate as to past acts, the approach of the court in looking to the *entire* legislation, along with forms issued pursuant to the regulations, leads us here to the same conclusion—the taxpayer-registrant is compelled by threat of criminal sanction to disclose that which inevitably would tend to incriminate him.

2. However Prospectively Interpreted, Payment Of The Special Tax And Registration May Tend To Incriminate The Taxpayer As To Past Acts

We here assume, for purpose of argument, that, in measuring the wagering tax provisions against the yardstick of the Fifth Amendment privilege, it is valid, notwithstanding the clear language of the registration form and Tax Return, to consider the wagering tax requirements purely prospective.[7] Even if that is done, that requirement, coupled with the criminal penalty of 26 U. S. C. 7203 for

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[7] Although *Kahriger* and *Lewis* seemed to ignore the registration provision, or at least the registration form, it has been held that registration also is totally "prospective". *United States v. Cefalu,* 338 F.2d 582 (7 Cir. 1964). That is difficult to reconcile with Form 11-C and the questions therein, e.g. *"Are* you engaged in the business. . . ." etc. At any rate, registration here *inevitably* leads to incrimination under the Supplementary Registration and disclosure provisions. 26 U.S.C. Sec. 4423; 26 C.F.R. §44.4412-1.

wilful failure to comply, violates the privilege against self-incrimination.

One of the most striking things about both the *Kahriger* and *Lewis* decisions is the Court's total failure to explain away some of our more significant Fifth Amendment decisions, *Counselman* v. *Hitchcock,* 140 U.S. 547,564 (1892), *Blau v. United States,* 340 U. S. 159 (1950), *Hoffman v. United States,* 341 U. S. 479 (1951). In those cases, the Court clearly held that the privilege extends not only to situations where an answer in itself could support a conviction, "but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[8] *Hoffman v. United States,* 341 U. S. at 486. The test there established concerning the validity of the claim of privilege was that "it need only be evident from the implications of the questions, in the setting in which it is asked, that a responsive answer or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result". 341 U. S. at pages 485-6. Since *Hoffman,* the court has further defined this test. *Albertson* now clearly indicates that the "link-in-the-chain" test applies not only to disclosures evidentiary in themselves, but also to those things which might "at least supply investigatory leads to a criminal prosecution", 382 U.S. at page 78, while in *Malloy v. Hogan,* 378 U. S. 1, 13, the Court heavily weighed, as part of the "setting", the fact that the grand jury interrogation was part of a "wide ranging inquiry into crime, including gambling"—a fair characterization, we think, of the Kefauver Committee "investigation" which gave birth to the legislation now in question. *Malloy* further emphasized that the privilege

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[8] *Murphy v. Waterfront Commission, supra,* has of course extended that protection to state crimes.

must be upheld unless it is " ' "*perfectly clear* . . . that the answer (s) *cannot possibly* have such tendency' to incriminate." ' " 378 U.S. at 12

We are here dealing with a "tax" on a business which is carried on in an area "permeated with criminal statutes"—where the government clearly seeks incriminating information *at least* as much as revenue—and where, under *Albertson, Malloy* and *Hoffman* every reasonable presumption in favor of the privilege's applicability should be entertained.

One possibly incriminating effect, as to past conduct, of the purchase of the stamp comes immediately to mind—even if we consider the annual $50 special tax wholly prospective in nature. First, the *Kahriger* court's view of the bookmaking "business" as something entered into at a specific instant in time, after due deliberation, much as a corporation "goes public", is not true to life or experience. A man quite often may drift into bookmaking, either by way of having been a "runner" or by virtue of having, over a period of time, increased his activity from single shot or social betting to a volume which merits a "business" label. Although, in both instances he would not previously have been liable for payment of the federal tax, *United States v. Calamaro,* 354 U. S. 351 (1957), *Kahn v. United States,* 251 F. 2d 160 (9 Cir. 1958), *United States v. Simon,* 241 F. 2d 308 (7 Cir. 1957), *George v. United States,* 346 F. 2d 137 (9 Cir. 1965), he doubtless had been violating state gambling laws. At the instant he becomes liable for the tax, or when he first becomes aware of the liability, he is faced with the choice of committing a federal crime by wilfully failing to pay the tax or of supplying investigatory leads which might result in conviction for his past activity in violation of state law.

State conspiracy statutes present even greater likelihood that compliance with the requirements of 4411 and 4412, however prospectively interpreted, will incriminate the taxpayer-registrant. The necessary listing of associates, even assuming Form 11-C's "Are you engaged . . ." and "Do you receive . . ." are translated somehow into the future tense, surely supports an inference that the taxpayer has *already agreed*, with those listed, to violate state law.[9] Since the payment of the tax, under federal law, is a condition precedent to actually going into business, payment and registration supply overt acts, thereby making the conspiracy offense complete. The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State v. Devine*, 149 Conn. 640,649, 183 A.2d 612,616 (1962), and need not be criminal acts in themselves. *United States* v. *Rabinowich*, 238 U.S. 78,86 (1915) The compulsory tax and registration does more than *tend* to incriminate the registrant—*it can convict him, of prior criminal acts, without any other evidence.* At least one state court has so held. *Acklen v. Tennessee*, 267 S. W. 2d 101 (Tenn. 1954).

3. Where Disclosures Are Compelled In An Area In Which The Specific Endeavor Is Illegal, The Privilege Should Apply Whether Registration Is Required Before Or After The Criminal Act

The heart of the *Kahriger* opinion is the Court's flat statement, relying only upon Professor Wigmore,[10] that the

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[9] One court has held, in affirming a conspiracy conviction based upon the wagering tax stamp, "It will not be gainsaid that common sense dictates the conclusion that these parties would not have gone to the trouble and expense complying with this federal law unless they fully intended to engage in the activity of which the tax was levied and paid." *Acklen v. Tennessee*, 267 S.W.2d 101, 104 (Tenn. 1954).

[10] 8 Wigmore (3d ed., 1940) § 2259 (c).

privilege relates "only to past acts, not to future acts that may or may not be committed". 345 U.S. at 32. We submit that nothing in Wigmore nor in the cases he relied upon justifies the application of the usual "record keeping" rules to the legislation here challenged; further, application of the *Kahriger* generalization "would permit the destruction of the privilege in all or almost all situations by ingeniously drawn legislation".[11] Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev.1 (1949).

The source, in Wigmore, of the Court's flat generalization concerning past and future acts is the Professor's discussion of statutes requiring certain records to be kept. The examples used were the "druggist's report of liquor sales, or a pawnbroker's record of pledges", 8 Wigmore at page 349, both *legal businesses*. It is clear that Wigmore's feeling that the privilege was inapplicable was largely based upon the legality of the "generic class of acts", 8 Wigmore at page 349, where "it is certain that only an occasional one will involve criminality". 8 Wigmore at page 352. Wigmore's "rule" would appear only to apply to legislation *"which merely requires beforehand a future report on a class of future acts among which a particular*

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[11] "Under the *Kahriger* rationale, the potential role of required information in the area of criminal prosecution appears almost unlimited. Assume, for example, the fancified possibility of an excise tax laid on the occupation of burglary, coupled with a registration statement requiring disclosure of the principle place of business—that is, where tools are kept and goods received or stored. These statements relating to future intent could, consistently with the *Kahriger* decision, provide prosecutors with a file of 'non-incriminatory' confessions before the fact which would be admissible into evidence at trial."

65 Colum L. Rev. 681,689, Required Information and The Privilege Against Self Incrimination, (1965)

one may or may not in the future be criminal . . ." 8 Wigmore at Pg. 349 (Emphasis in source)

Unlike the druggist and the pawnbroker, *all* of a gambler's business is illegal—at least in Connecticut. Any and all further acts will necessarily be criminal. Any compelled disclosure will incriminate. In a setting such as this one, the rules governing pawnbrokers are totally inapposite.

Of great significance here is the reason, or lack thereof, for the requirement of prior payment and registration. This clearly is not a licensing statute where the government, as with I.C.C. franchises, seeks to regulate the number of licensees or the areas in which they work—nor, like most state liquor licensing schemes, is the sovereign attempting to maintain minimum standards in its liquor outlets and permittees. Here, you simply pay the $50 tax, register, and receive your stamp—there are no other requirements for entering the business. The condition precedent requirement was either a Congressional accident, totally unrelated to the stated legislative purpose of raising revenue, or, much more likely, a deliberate attempt to subvert the privilege against self-incrimination.[12] To grant success to the sovereign by use of such a gimmick hardly maintains a "fair-state-individual balance". *Miranda* v. *Arizona*, 384 U.S. 436,460 (1966). Just as *Albertson* drew a meaningful distinction, where the privilege was concerned, between completion of the basically innocuous federal income tax return and the registration forms for Communists, here too we must differentiate between druggists and gamblers.

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[12] Professor Morgan's "ingeniously drawn legislation". 34 Minn. L. Rev. 1, (1949)

C. KAHRIGER AND LEWIS RUN COUNTER TO OUR BASIC SENSE OF JUSTICE EMBODIED IN THE FIFTH AMENDMENT PRIVILEGE

In more than a century and a half of constitutional interpretation, this Court, in its decisions defining the reach of the Fifth Amendment privilege against self-incrimination, has "groped for the proper scope of governmental power over the citizen". *Miranda v. Arizona,* 384 U.S. 436,460 (1966). As compulsion of one sort or another by the sovereign has manifested itself in increasingly sophisticated forms the privilege, reflecting "our most noble aspirations", *Murphy v. Waterfront Commission,* 378 U.S. at 55, has blossomed forth as a protection against "subtle encroachments on individual liberty". *Miranda v. Arizona,* 384 U.S. at 460. While the Court's defining of the privilege "as broad[ly] as the mischief against which it seeks to guard", *Counselman v. Hitchcock,* 142 U.S. 547, 562, has perhaps been most dramatic in the confession cases,[13] there have been other "subtle encroachments" which have recently been met.

One of the most important of these was the discarding of the so-called "dual sovereignty" rule of *United States v. Murdock, supra, Knapp v. Schweitzer,* 357 U.S. 371 (1958), and *Feldman v. United States,* 322 U.S. 487 (1944). In *Murphy v. Waterfront Commission, supra,* pointing to the inherent unfairness of an accused being "whipsawed" into incriminating himself under state or federal law, especially "in our age of 'cooperative federalism' ", the Court held that answers compelled in a state investigation might not

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[13] *Brown v. Mississippi,* 297 U.S. 278 (1936); *Chambers v. Florida,* 309 U.S. 227 (1940); *Haynes v. Washington,* 373 U.S. 503 (1963); *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966).

be used in connection with a federal prosecution. 322 U.S. at 55-6, 79-80.

Murphy, however, has not totally done away with the "whipsaw". That registration and payment of the gambling tax not only incriminates, but is fully intended by the sovereign to incriminate, is amply demonstrated by the following statement of Mortimer M. Caplan, former Commissioner of Internal Revenue, writing in 1962 for the *Journal of Crime and Delinquency*, Vol. 8, in an article titled *The Gambling Business and Federal Taxes:*

> "The enforcement of local anti-gambling laws is a function of police powers reserved to the states by the Tenth Amendment. However, the Federal government can assist these local agencies to enforce such laws more effectively in a number of ways. Supplying information that is helpful to local law-enforcement is one very important aid. *As an example, the Internal Revenue Service makes available to those agencies the names and addresses of those who have paid wagering taxes.*
>
> . . .
>
> The District Director of Internal Revenue is required by law to maintain for public inspection an alphabetical listing of the names of all persons who have paid certain "special taxes". This includes both the excise and the occupational taxes on wagering.
>
> *The dilemma of the bookmaker is apparent. If he registers and pays the wagering taxes, he is generating evidence of his gambling activities—evidence that is available to local authorities. If he does not register, he exposes himself to the sanctions and penalties contained in the Federal Wagering tax laws."* p. 697. (Emphasis added)

"Non-incriminatory" registration disclosures compelled by threat of criminal prosecution have been and are being

used to obtain convictions for other criminal offenses, both state and federal. *Irvine v. California,* 347 U.S. 128 (1954); *State v. Curry,* 92 Ohio App. 1,109 N.E.2d 298 (1952); *Commonwealth v. Fiorini,* 202 Pa. Super. 88, 195 A.2d 119 (1963); *Acklen v. Tennessee,* 267 S.W.2d 101 (Tenn. 1963); *State v. Mills,* 229 La. 758, 86 So. 2d 895 (1956); *United States v. Zizzo,* 338 F. 2d 577 (7 Cir. 1964).

Regardless of whether, technically, this legislation looks to the past or future, it would be difficult to explain to someone convicted through use of his own registration statement that he had not been "compelled" to bear witness against himself.[14] A result similar to that reached in *Kahriger* and *Lewis* may be duplicated by legislatures at will by use of what is essentially a "gimmick" of legislation. The privilege should surely rise higher than congressional ingenuity; if it does not, we are all in trouble.

CONCLUSION

This Court has been scrupulous in protecting the citizen from governmental overreaching destructive of a "fair state-individual balance" in the criminal process; always, especially in recent years, has it jealously guarded from erosion—by legislature, judge, prosecutor or policeman—the Fifth Amendment privilege against self-incrimination, "the essential mainstay of our adversary system". *Miranda v. Arizona,* 384 U.S. at 460. The decisions in *Kahriger* and *Lewis* stand out strikingly, in the recent history of the Court, as exceptions both in their narrow unrealistic approach to the legislation in question and in the restrictive

[14] The literal use of "compelled" by the Court in Lewis is unjustified. In *Griffin v. California,* 380 U.S. 609 (1965), it was held that the making of the "assertion [of the privilege] costly", was an unconstitutional "compelling" proscribed by the Fifth Amendment.

scope there accorded the privilege. We ask the Court now to overrule both cases and to recognize the real violence done the privilege by the wagering tax. We ask that the judgments below be reversed and the indictments ordered dismissed.

Respectfully submitted

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APPENDIX

APPENDIX A

The following is the relevant portion of the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Grassia,* 354 F.2d 27 (2 Cir. 1965).

FRIENDLY, *Circuit Judge:*

This is another appeal stemming from the raids relating to enforcement of the federal wagering tax at Bridgeport, Connecticut, on October 8, 1964. See *United States* v. *Costello,* 352 F. 2d 848 (2 Cir. 1965), *United States* v. *Piccioli,* 352 F. 2d 856 (2 Cir. 1965), and *United States* v. *Markis,* 352 F. 2d 860 (2 Cir. 1965). Alfred Grassia, represented by counsel and duly questioned by Judge Clarie at a term of the District Court for Connecticut at Hartford, to which, at his request, his case had been transferred for trial on his not guilty plea, pleaded *nolo contendere* to one count of a two-count indictment charging, under 26 U. S. C. §7203, willful failure to pay the special occupational tax relating to wagers imposed by 26 U. S. C. §4411. The other count was then dismissed at the Government's request. His points on appeal from the resulting conviction fall into two categories. The first repeats the same constitutional attacks on the federal wagering tax statutes that were advanced in the earlier cases. His other point is that the conscious generation of publicity by the Government and statements by Chief Judge Timbers in the course of other proceedings in January and February, 1965, prior to Grassia's change of plea,[1] see *United States* v. *Costello, supra,* 352 F. 2d at ——, *United States* v. *Piccioli, supra,* 352 F. 2d ——, so prejudiced his opportunity for a fair trial that the indictment should have been dismissed.

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[1] The judge's statements were the basis of one of several motions by Grassia to dismiss the indictment or for a continuance.

The first group of contentions, challenging the constitutionality of the federal wagering tax statutes, survive the plea of *nolo contendere,* as the Government concedes. But, so far as this Court is concerned, they have been determined adversely to Grassia by *United States* v. *Costello, supra,* 352 F. 2d 848. Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* 382 U. S. 70 (1965), announced subsequent to our *Costello* opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U. S. 22 (1953), and *Lewis* v *United States,* 348 U. S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination.

APPENDIX B

Amendment V, Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. §4401

(a) Wagers.—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) Amount of wager.—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

26 U.S.C. §4411

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U.S.C. §4412

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

26 U.S.C. §4422

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from

any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

26 U.S.C. §4423

Notwithstanding section 7605 (b), the books of account of any person liable for tax under this chapter may be examined and inspected as frequently as may be needful to the enforcement of this chapter.

26 U.S.C. §4901

(a) Condition precedent to carrying on certain business.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

(b) Computation.—All special taxes shall be imposed as of on the first day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for 1 year, and in the latter case it shall be reckoned proportionately, from the first day of the month in which the liability to a special tax commenced, to and including the 30th day of June following.

(c) How paid.—

(1) Stamp.—All special taxes imposed by law shall be paid by stamps denoting the tax.

26 U.S.C. §6011

(a) General rule.—When required by regulations prescribed by the Secretary or his delegate any person made liable for any tax imposed by this title, or for the collection

thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary or his delegate. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

. . .

26 U.S.C. §7203

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of secion 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

26 C.F.R. §44.4412-1 (Relevant Portions)

. . .

(b) . . .

(2) Each person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may receive wagers on his behalf. Thereafter, a return shall be filed on Form 11-C, marked "Supplemental", each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such additional em-

ployee or agent is engaged to receive wagers and shall show the name, address, and number appearing on the special (occupational) stamp of each such agent or employee. As to a change of address, see § 44.4905-2.

(3) Each agent or employee who receives wagers for or on behalf of a person engaged in the business of accepting wagers on his own account shall report on Form 11-C the name and residence address of each person (i.e., individual, partnership, corporation, etc.) on whose behalf wagers are to be received. Thereafter, the agent or employee shall file a return on Form 11-C, marked "Supplemental", each time he is engaged or employed to receive wagers for a person or persons other than the person or persons previously reported on Form 11-C. Such supplemental return shall be filed not later than 10 days after the date he is engaged to receive wagers and shall show the name, business address, or, if none, the residence address of the person or persons by whom he is engaged to receive wagers.

Section 53-295, Conn. Gen. Stats.

Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election, whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly

or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of sellings pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, on the first conviction shall be fined not more than one thousand dollars or be imprisoned not more than one year or be both fined and imprisoned; and on a second or subsequent conviction shall be fined not less than five hundred dollars nor more than three thousand dollars and be imprisoned not less than thirty days nor more than three years; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or

machine and the charging of an admission or entrance fee to any contestant in any such trial or contest.

Section 53-298, Conn. Gen. Stats.

Policy playing; gaming by use of lottery slips or tickets. Any person, whether a principal, agent or servant, who owns, possesses, keeps, manages or maintains, or assists in keeping, managing or maintaining, any policy-office or place where the game of chance, business, scheme or occupation, commonly known as policy, is, or is reputed to be, played or carried on, or any place where bets or wagers are, or are reputed to be, made upon the result of a drawing in any lottery, or of the drawing of any numbers of chance, or any place which is, or is reputed to be, resorted to for any such purposes in whole or in part, or writes, sells, bargains, exchanges, gives, transfers, delivers, buys, collects or receives, or is concerned in writing, selling, bargaining, exchanging, giving, transferring, delivering or receiving, any policy slips, tickets, tokens, numbers or chances, used in said game of chance, business, scheme or occupation, or in wagering or betting upon the result of any drawing in any lottery, or in any drawing of any numbers by chance, or collects or receives, or is concerned in receiving or collecting, any money or other valuable thing for any such slips, tokens, numbers or chances, or makes, manufactures or keeps, or is the custodian of, any slips, tokens, papers, books, records or registers of bets or wagers, or any appliances or apparatus used for any such purposes, and any owner, mortgagee in possession, lessee or occupant of any building, room, structure or place, or part thereof, who knowingly permits the same to be used or occupied for any of the purposes mentioned in this section, for a first offense, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both; for a second or

subsequent offense, shall be fined not less than five hundred dollars nor more than three thousand dollars or imprisoned not more than three years, or both; and each day of any such above-mentioned activity shall constitute a separate offense. Any person who plays or takes part in any such game of chance, business, scheme, occupation, betting or wagering, in or out of any such office or place, or frequents any place or office where the game of chance, business, scheme or occupation, commonly known as policy, is, or is reputed to be, played or carried on in whole or in part, or any place where wagers or bets are, or are reputed to be, made upon the result of any drawing in any lottery, or of any drawing of any numbers by chance, or frequents any place which is, or is reputed to be, resorted to for any of such purposes in whole or in part, for a first offense, shall be fined not more than one hundred dollars or imprisoned not more than six months or both; for a second offense, shall be fined not more than two hundred fifty dollars or imprisoned not more than one year, or both; and, for a subsequent offense, shall be fined not more than five hundred dollars or imprisoned not more than three years, or both.

§54-197, Conn. Gen. Stats.

Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misde-

meanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers members or agents of such organization except upon proof of participation in or authorization of such acts or of the ratification thereof.

In the Supreme Court of the United States

October Term, 1959

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 41

FRANK COSTELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 16–29) is reported at 352 F. 2d 848.

JURISDICTION

The judgment of the court of appeals (R. 29–30) was entered on October 29, 1965. A petition for rehearing was denied on November 26, 1965 (R. 31). The petition for a writ of certiorari was filed on December 16, 1965, and was granted on March 21, 1966, limited to Question 1 (R. 32; 383 U.S. 942). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

This Court limited its grant of certiorari to Question 1 of the petition, which reads as follows:

> Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70 (1965), overrule *United States* v. *Kahriger*, 345 U.S. 22 (1953) and *Lewis* v. *United States*, 348 U.S. 419 (1955)?

STATUTES INVOLVED

Internal Revenue Code of 1954.

Section 4401(a) provides:

Wagers.

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

Section 4411 provides:

Imposition of tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable.

Section 4412 provides:

Registration.

(a) Requirement.

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.

Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.

In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter.

Section 4421 provides:

Definitions.

For purposes of this chapter—

(1) Wager.

The term "wager" means—

(A) any wager with respect to a sports event or contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

Section 4422 provides:

Applicability of federal and state laws.

The payment of any tax imposed by this chapter with respect to any activity shall not exempt any person from any penalty provided by a law of the United States or of any State for engaging in the same activity, nor shall the payment of any such tax prohibit any State from placing a tax on the same activity for State or other purposes.

Section 4901(a) provides:

Condition precedent to carrying on certain business.

No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461(2) (coin-operated gaming devices), 4721 (nar-

cotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

Section 6107 provides:

> *List of special taxpayers for public inspection.*
> In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Connecticut on two indictments charging wagering tax violations (R. 9–12). One indictment charged a conspiracy among petitioner and co-defendants Marchetti and Gjanci wilfully to fail to pay the special occupational tax levied on persons engaged in the business of accepting wagers (R. 1–2). The second indictment, in two counts, charged, in count one, the wilful failure to pay the special occupational tax, as required by 26 U.S.C. 4411, prior to engaging in the business of accepting wagers; and in count two, the wilful failure

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to register, as required by 26 U.S.C. 4412, prior to engaging in the wagering business (R. 3–4).

After the jury verdict,[1] co-defendant Marchetti moved to arrest judgment, in part on the ground that the statutes providing for payment of the special occupational tax and the questions on the registration form violated his Fifth Amendment privilege against self-incrimination (R. 5–6). Petitioner Costello also moved in arrest of judgment, in part on the ground that the statutes violated his Fifth Amendment privilege. He adopted, as part of his motion, co-defendant Marchetti's brief in support thereof (R. 8–9). The trial judge denied the motion (R. 8).

Petitioner was sentenced on the conspiracy count to imprisonment for one year and fined $10,000 (R. 10). He was also sentenced to imprisonment for one year and fined $10,000 on the first of the substantive counts, this sentence to run concurrently with that imposed on the conspiracy count. Sentence on the second substantive count was suspended and petitioner was placed on probation for two years following his release from prison (R. 12).

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[1] The jury found petitioner guilty on all counts (R. 9–12). At the trial, petitioner Costello took the stand in his own defense (Tr. 1076) and denied accepting any wagers (Tr. 1088–1089). Co-defendant Marchetti also took the stand and admitted accepting some bets (Tr. 1130–1131). Co-defendant Gjanci did not testify. The evidence of non-registration and non-payment of the special occupational tax was stipulated to by the parties (Tr. 1035–1036). Petitioner's co-defendants have also sought review in this Court. See *Marchetti* v. *United States*, No. 38, and *Gjanci* v. *United States*, No. 27 Misc., both this Term, *petitions for certiorari pending*.

On appeal the court below held that the claim with respect to the self-incrimination clause was controlled by *United States v. Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, and affirmed the judgment of conviction.[2]

SUMMARY OF ARGUMENT

I

The registration provision of the wagering tax statutes does not violate the privilege against self-incrimination. Registration provisions have commonly and traditionally been included in excise tax measures, and are reasonable incidents to the exercise of the taxing power. An individual may choose whether or not to enter the business of accepting wagers, and the statutes make clear in advance the conditions that attach to the business. Since the registration need relate only to intent to engage in the business in the future and not to past acts, it does not require admissions that might be incriminatory. This reasoning, accepted in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, is not undermined by the decision in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70. The registration provision in *Albertson* is distinguishable because it involved declarations of

[2] The instant case is one of a series of cases resulting from an extensive investigation of federal wagering tax violations in Connecticut, which, in addition to the cases of petitioner's co-defendants, are presently pending on petitions for certiorari. Nos. 43, 44, 55, 56, 64, this Term. Similar issues are involved in *Driscoll* v. *United States*, No. 97, from Massachusetts, *Grosso* v. *United States*, No. 181, from the Western District of Pennsylvania, and *Conti* v. *United States*, No. 330, from the Southern District of New York, all this Term.

present status rather than of future intent, and disclosure there might have impinged directly on First Amendment rights. Moreover, the registration requirement considered in *Albertson* served no separate and independent governmental purpose apart from the interest in the individual's underlying activity. In the present case, the registration provision has a valid, separate purpose, *i.e.*, to secure information necessary for the collection of the tax.

II

Even if the registration and payment of the wagering taxes might in some circumstances require revealing possibly incriminating information, full protection of the privilege can be afforded by proscribing non-tax uses of the information. Such a resolution would enable the United States to make use of the information for the undeniably legitimate purpose of administering the tax measure and collecting the revenue, while protecting the taxpayer against its use for other and discrete purposes. A similar resolution was adopted by this Court in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, in which there was a similar choice—whether to excuse a witness from the normal duty to testify or to provide an appropriate safeguard against use of that testimony for purposes of prosecution. Both *Murphy* and *United States* v. *Blue,* 384 U.S. 251, show that in circumstances such as here presented a simple exclusionary rule will protect the individual without sacrifice of the separate and independent governmental interest.

ARGUMENT

INTRODUCTION

The wagering tax laws provide for a fifty-dollar occupational tax for those who intend to engage in the business of accepting wagers. 26 U.S.C. 4411. In addition, an excise tax of ten per cent on the gross amount of the wagers accepted is imposed. 26 U.S.C. 4401(a). These taxes were adopted as part of the Revenue Act of 1951, which was designed to meet the extraordinary increase in revenue necessitated by military action in Korea. H. Rep. No. 586, 82d Cong., 1st Sess. 1; S. Rep. No. 781, 82d Cong., 1st Sess. 1. Although the yield has been less than anticipated, in the first full fiscal year of its existence the tax produced 10.5 million dollars in revenue, and 15,710 special occupational tax stamps were purchased. Commissioner of Int. Rev. Ann. Rep. 4, 142–143 (1953). In the last fiscal year, 7,284 occupational tax stamps were purchased and 6.6 million dollars was collected. Commissioner of Int. Rev. Ann. Rep. 115, 125 (1965).

The wagering tax laws provide for the registration of those liable for the fifty-dollar ocupational tax. Registration provisions have long antecedents in the tax field,[3] and, indeed, the registration of those liable for special taxes is an integral feature of the Internal

[3] See, *e.g.*, 1 Stat. 145–178 (delivery of manifests to customs collector and permits to unload imported goods); 1 Stat. 205 (requiring certain distillers to register place of business and storage); 1 Stat. 377 (licensing of retail dealers in certain distilled spirits); 1 Stat. 385 (manufacturers of snuff required to register and list every home or building in which the business would be carried on).

Revenue Code.[4] Obviously, without information such as the name, address, and location of business of one liable for a special tax, collection would be extremely difficult, if not impossible. Thus, this Court has consistently upheld registration requirements as a reasonable incident to the exercise of the taxing power, without regard to the legality of the business or underlying activity involved. See *United States* v. *Sanchez,* 340 U.S. 42 (marihuana); *Sonzinsky* v. *United States,* 300 U.S. 506 (firearms); *Nigro* v. *United States,* 276 U.S. 332, and *United States* v. *Doremus,* 249 U.S. 86 (narcotics).

The wagering tax laws also provide for listing and public disclosure of the names of registrants. 26 U.S.C. 6107. Like registration requirements, provisions for public disclosure are a common feature of revenue measures.[5] In addition to disclosure of registrants for certain occupational taxes,[6] other more gen-

[4] See 26 U.S.C. 7011. Registration provisions in aid of collecting special taxes have been imposed in relation to numerous occupations and business activities, *e.g.*, § 4101 (those subject to tax on petroleum products); § 4222 (registration regarding certain tax-free sales by manufacturers); § 4722 (those engaged in dealing in narcotic drugs); § 4753 (those who deal in marihuana); § 4804(d) (manufacturers of white phosphorus matches); §5171–5172 (registration of distilleries); § 5179 (registration of stills); § 5502 (manufacturers of vinegar); § 5802 (importers, manufacturers, and dealers in firearms); § 5841 (those who possess certain firearms).

[5] See, *e.g.*, 1 Stat. 205 (distillers required to paint conspicuously on their place of business the words "Distiller of Spirits"); 17 Stat. 403 (collectors required to post conspicuously, for public inspection, alphabetical lists of all those who paid special taxes).

[6] See, *e.g.*, § 4461 (those who maintain for use or permit use of coin-operated amusement or gaming devices); § 4471

eral provisions for public scrutiny of taxpayers are found throughout the Revenue Code. See, *e.g.*, Section 6103(f) (lists of taxpayers); Section 6104 (returns of certain tax-exempt organizations); Section 6105 (lists of those who have been granted excess profit relief).[7] These provisions serve, among other things, to facilitate collection of revenue by stimulating voluntary compliance with the tax laws.[8]

(those who operate a bowling alley, billiard room or pool room); § 4721 and § 4702(a)(2)(C) (those who deal in narcotic drugs); § 4751 (dealers in marihuana); § 4821 (manufacturers or dealers in renovated or adulterated butter); § 4841 (manufacturers or dealers in filled cheese); § 5081 (those who rectify distilled spirits or wines); § 5091 (brewers of beer); § 5101 (manufacturers of stills); § 5111 (wholesale dealers in liquors, wines and beer); § 5121 (retail dealers in liquors, wines and beer); §5801 (dealers in certain firearms). Under § 6806(c), a registrant must post the wagering tax stamp in his place of business or carry it with him.

[7] Section 6107 differs somewhat, however, in its specific mention of making lists of registrants for various special taxes available to local prosecutors. It should be noted that this directive was enacted long before the wagering tax laws, see 34 Stat. 387 (1906), to overcome the Treasury regulation involved in *Boske* v. *Comingore*, 177 U.S. 459.

[8] The wagering tax was upheld as a proper exercise of the taxing power in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419. See also *Ingram* v. *United States*, 360 U.S. 672; *United States* v. *Calamaro*, 354 U.S. 351. To be sure, in enacting the measure, some members of Congress may have had motives collateral to the raising of revenue, but, as this Court has often held, such motives are not subject to examination and "a tax is not any the less a tax because it has a regulatory effect." *Sonzinsky* v. *United States*, *supra*, 300 U.S., at 513. See also *License Tax Cases*, 5 Wall. 462. However, the legislative history substantiates that Congress sought to raise revenue by getting at a previously untapped source. See 97 Cong. Rec. 12231–12243 (1951); H. Rep. No. 586, *supra*, at 55; S. Rep. No. 781, *supra*, at 113. Because of the

I

SINCE THE REGISTRATION REQUIREMENT IS A KNOWN CONDITION TO THE VOLUNTARY ACT OF ENTERING THE BUSINESS OF ACCEPTING WAGERS, IT DOES NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION

The federal wagering[9] tax statute's requirements of registration and payment of a special occupational tax, at issue here, do not result in a violation of the registrant's privilege against self-incrimination. Conversely, non-registration and non-payment cannot be justified by invoking the privilege. It is obvious that the requirements of the taxing measure do not conflict with the Fifth Amendment in places where gambling is lawful.[10] However, even in the far more common case where gambling is illegal under State or local law, we submit that the privilege is not infringed. No one is compelled to enter or to engage in the wagering business. And any individual who chooses to do so is plainly warned in advance that he will have to provide information which he might

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limited grant of certiorari, which did not extend to Question 2 of the Petition relating to the taxing power and the Tenth Amendment, we have assumed that the validity of the tax as a tax is not at issue.

[9] "Wagering," as defined by Section 4421 of the Revenue Code, *supra*, pp. 3–4, does not include the full scope of gambling activities generally proscribed by State or local law.

[10] If the federal government imposed a tax upon a business only because and to the extent that it was illegal, the validity of the measure as an exercise of the taxing power would be subject to serious question. See *United States* v. *Constantine*, 296 U.S. 287, in which the Court held unconstitutional a special tax imposed only upon those liquor dealers who engaged in business where prohibited by local or municipal law.

prefer to keep private.[11] Thus, he has the choice of entering into the business, subject to a concomitant duty to disclose information relevant to collection of the tax, or of staying out of the business, and thereby insuring that his private activities are as private as he desires them to be. The statute, in 26 U.S.C. 4901, makes the payment of the special occupational tax, for which registration is required, a "condition precedent" to engaging in the business. It provides in part:

> (a) Condition precedent to carrying on certain business.
>
> No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering) * * * until he has paid the special tax therefor.

This section makes clear the conditions pertaining to the business of accepting wagers. A person contemplating entry into the business obviously considers, if his State prohibits gambling, that he will be engaged in illegal activity. Having voluntarily elected to do so, however, he should not be heard to complain of the requirements of preexisting federal law. We stress that the information required by registration need relate only to the future, considering

[11] Disclosures—often highly detailed—are required under federal law of those who choose to engage in many occupations. See, *e.g.*, 15 U.S.C. 80b–3 (investment advisers); 47 U.S.C. 301 *et seq.* (radio stations); 49 U.S.C. 1371 (air carriers); 49 U.S.C. 306 *et seq.* (motor carriers); 2 U.S.C. 267 (lobbyists); 29 U.S.C. 432 (officers and employees of labor organizations); 29 U.S.C. 433 (reports of employers); 7 U.S.C. 203 (stockyard dealers or market agencies).

the form now in use; it does not necessarily require admission of any past acts that might be unlawful.[12]

This was the rationale of both *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419. In the *Kahriger* case, this Court stated, 345 U.S., at 32–33:

> * * * If respondent wishes to take wagers subject to excise taxes under § 3285 [now § 4411] *supra*, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions.

And in *Lewis*, this Court said, 348 U.S., at 422–423:

> If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, * * * he cannot be compelled to testify and may claim his privilege. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshhold.

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[12] The questions on the form now in use, adopted subsequent to the decisions in *Kahriger* and *Lewis*, are phrased in the alternative, *e.g.*, "Are you or will you be engaged in the business of accepting wagers on your own account?" (see Appendix, *infra*). The old form (see R. 7), in use prior to 1963, asked, "Are you engaged in the business * * *?" Thus, on the present form an affirmative answer is at most equivocal.

> They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.[13]

The rationale of *Kahriger* and *Lewis* is as valid today as it was when formulated by this Court.[14]

We recognize that in *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, it could have been said that members of the Communist Party had a period within which to get out of the party, and to that extent had a choice whether or not to subject themselves to the duty to register. Nevertheless, we believe that case is distinguishable. In *Albertson*, it was clear that the registration requirement related to present status, *i.e.*, party membership, rather than to future intent. In addition, since membership in the Communist Party without knowledge of its un-

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[13] Similarly, in *Fougera & Co.* v. *City of New York*, 224 N.Y. 269, 279, Judge Cardozo reasoned:

> * * * The sale of medicines is a business subject to governmental regulation. One who engages in it is not compelled by this ordinance to expose himself to punishment for any offense already committed. He is simply notified of the conditions upon which he may do business in the future. He makes his own choice. To such a situation, the privilege against self-accusation has no just application. [Citations omitted].

[14] To the extent that the Fifth Amendment decision in *Kahriger* was based on considerations of dual sovereignty, its validity has been undermined by more recent developments in the scope of the privilege. See *Malloy* v. *Hogan*, 378 U.S. 1; *Murphy* v. *Waterfront Commission*, 378 U.S. 52. The *Lewis* case, however, has not been so affected, for it involved only the federal government, in that the defendant was a resident of the District of Columbia where gambling was prohibited by an act of Congress. See 348 U.S., at 420; *id.*, at 423–424 (Black, J., dissenting).

lawful purposes or intent to further them is constitutionally protected (see *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 393; *Noto* v. *United States*, 367 U.S. 290, 299–300; *United States* v. *Brown*, 381 U.S. 437, 455–556), compulsory disclosure of membership—with its hazard of prosecution—might deter lawful association. No such countervailing constitutional interest is involved when disclosure pertains not to speech or association but to gambling.

Moreover, the wagering tax registration provision serves a valid governmental interest—to make possible the collection of the tax. Indeed, the provision was characterized in *Kahriger* as "directly and intimately related to the collection of the tax and * * * 'obviously supportable as in aid of a revenue purpose' " (345 U.S., at 31–32). That valid purpose distinguishes it from the registration requirement involved in *Albertson*, which, in light of the determination of the Subversive Activities Control Board, served little purpose, this Court concluded, other than to require the revelation of incriminatory information "in an area permeated with criminal statutes" (382 U.S., at 79) designed to regulate the very activity the registrants were required to admit, *viz.*, membership in subversive organizations. In other words, in *Albertson* there was no reason for the information apart from the activity directly regulated and deemed criminal. In contrast, the registration provision here involved has a valid purpose—to secure information necessary for the collection of taxes—quite apart from any con-

sideration whether the underlying activity of the registrant is legal or not.

We urge, therefore, that *Albertson* does not require a departure from the holdings of *Kahriger* and *Lewis* and that the Court should adhere to those decisions.

II

EVEN ASSUMING THAT REGISTRATION WOULD PROVIDE INFORMATION THAT MIGHT BE INCRIMINATORY IF USED IN A PROSECUTION FOR THE UNDERLYING ACTIVITY, THE PROPER REMEDY IS TO BAR SUCH USE, RATHER THAN TO UPHOLD A REFUSAL TO REGISTER

If, contrary to the views stated above and the prior holdings of this Court, it should now be concluded that registration under the wagering tax laws carries with it a sufficiently substantial danger of implicating the registrant in past or contemporaneous criminal activity so as to bring into play the protections of the Fifth Amendment, it by no means follows that the entire federal taxing scheme, or even the registration requirement, must fall. We shall assume *arguendo* in this part of the brief that the apprehension of incrimination is not insubstantial. In that circumstance, we urge, the answer to the question posed in this case is not that refusal to register is therefore warranted. Rather, the proper accommodation should be to place appropriate limits upon the use of the information obtained as a result of the registration statement.

A. NO INCRIMINATION RESULTS FROM REGISTRATION IF THE INFORMATION IS USED SOLELY FOR TAX PURPOSES

Registration serves a legitimate governmental interest in the collection of the wagering taxes, apart

from any question of the legality *vel non* of the registrant's activities under either State or federal law. Without registration, the occupational tax of fifty dollars would not be assessable, and collection of the ten per cent tax imposed on wagers by 26 U.S.C. 4401 would be virtually impossible. So long as the information [15] obtained is confined to this legitimate tax use, no problem of self-incrimination arises.[16] Even though the lists of those who purchase the occupational tax stamps are made publicly available, the privilege is not violated unless the fact of registration, or the information disclosed thereby, is in some way used in a criminal prosecution for the underlying activities of the registrant. As this Court held in *Ullmann* v. *United States*, 350 U.S. 422, the privilege protects one not from general public opprobrium, but solely from giving information leading to the imposition of criminal penalties.

While it is true that there are various federal

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[15] See the registration form, set out in the Appendix, *infra*. In addition to answering the questions discussed in note 12, *supra*, the registrant is required to give his name, alias or trade name (if any), residence, place of business, and the names of his employees or employer, as may be applicable. If the registrant is a corporation, its officers are to be listed.

[16] It is obvious that no problem of self-incrimination arises at all unless at the time the information is sought, considering "the implications of the question" and "the setting in which it is asked," it would have some tendency to incriminate, *i.e.*, that the "witness has reasonable cause to apprehend danger from a direct answer." *Hoffman* v. *United States*, 341 U.S. 479, 486. The privilege would not, however, prevent the later use of information, innocuous when obtained, because subsequent illegal conduct makes it then relevant. See note 19, *infra*.

crimes relating to gambling,[17] there is no federal statute prohibiting it as such. Since the federal laws merely interdict the use of interstate facilities, or foreign travel, for some activities connected with gambling, it is clear that a person who operates his wagering business within a State is in no danger of federal prosecution if he registers and pays the tax. However, most States make gambling illegal.[18] Thus it is State prosecution that petitioner, and others similarly situated, primarily fear. We submit that the wagering tax and its registration requirement can be preserved for tax purposes if non-tax uses of the information, by either the States or the federal government, are appropriately confined.[19]

B. FULL PROTECTION OF PETITIONER'S PRIVILEGE CAN BE ACCORDED BY PROSCRIBING NON-TAX USES OF THE INFORMATION OBTAINED FROM REGISTRATION

An individual's Fifth Amendment privilege against self-incrimination may be effectuated, in certain sit-

[17] See 18 U.S.C. 1952 (interstate and foreign travel in aid of racketeering enterprise); 18 U.S.C. 1953 (interstate transportation of wagering paraphernalia); 18 U.S.C. 1081–1083 (operation of a gambling ship); 18 U.S.C. 1084 (transmission of wagering information); 18 U.S.C. 1301–1305 (importing or mailing lottery tickets; broadcasting lottery information).

[18] Gambling is illegal in Connecticut, where petitioner lives. Conn. Gen. Stat. Rev., *e.g.*, §§ 53–293 to 53–298. (1965 Supp.), in part set forth in Appendix B of Petitioner's Brief, pp. 32–35.

[19] Assuming that an individual registers and pays the occupational tax, no Fifth Amendment problem would arise if those facts are used in a subsequent prosecution for non-payment of the ten per cent excise tax. The privilege against self-incrimination cannot serve to immunize one from prosecution for future non-compliance with the law; it does not assume that one will choose in the future to commit unlawful acts. See note 16, *supra*.

uations, by focusing either upon the point of attempted *compulsion* or upon the time of attempted *use* of the information obtained. See *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 57 n. 6. This Court has fashioned exclusionary rules in other contexts for what are, in essence, problems grounded on the privilege. See, *e.g., Miranda* v. *Arizona,* 384 U.S. 436; *Haynes* v. *Washington,* 373 U.S. 503; cf. *Mapp* v. *Ohio,* 367 U.S. 643. Usually, no choice of remedy to effectuate the constitutional rights involved is available; in both the coerced confession and *Miranda* situations, the Court could, as a practical matter, focus only upon the point of attempted use. However, in *Murphy,* the constitutional claim could have been satisfied by fashioning a remedy applicable at either of the two points: the initial stage when the questions are asked and the answers sought to be compelled, or at a later point, when and if an attempt is made, in a criminal prosecution, to use the information so obtained. Thus, the Court might have upheld the witness' refusal (in that instance, in a State proceeding) to give answers possibly incriminating under federal law. That resolution, as the Court recognized, would have unduly inhibited the State's interest in securing "information necessary for effective law enforcement" (378 U.S., at 79) through legislative investigation, a legitimate and separate governmental interest apart from that relating to the underlying activities of the particular individual. Compare *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70. Hence, the Court stated (378 U.S., at 79):

> * * * [W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. * * *

Similarly, in *United States* v. *Blue*, 384 U.S. 251, this Court, in reinstating an indictment for tax evasion, held just last Term:

> Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * *[20]

Murphy and *Blue* show that when there is a choice as between one or the other point of incidence, the "use point" should be selected if the information sought would serve a legitimate and independent pur-

[20] 384 U.S., at 255. See also *Adams* v. *Maryland*, 347 U.S. 179, "in which the Court suggested that the Fifth Amendment bars *use* by the States of evidence obtained by the Federal Government under threat of contempt," *Murphy* v. *Waterfront Commission*, *supra*, at 75 (emphasis supplied). See also *Irvine* v. *California*, 347 U.S. 128, 141 (Black, J., dissenting). Indeed, the instant case seems to be a stronger one than *Murphy* for adoption of a use-restriction rationale; otherwise, the Court might find itself faced with the solemn task of striking down, at least in part, a congressional enactment.

pose—an accommodation which protects the rights of the private party without sacrificing the interests of the sovereigns concerned. In the *Albertson* case, no such independent purpose was involved. See *supra*, p. 16. Here, however, the alternative course suggested in this part of our brief with respect to the wagering tax registration requirement would serve the federal interest in collection of revenue, while fully protecting the registrant. It is also entirely consistent with the Court's traditional function of defining the scope of the Fifth Amendment privilege, for, as stated in *Adams* v. *Maryland*, 347 U.S. 179, 181:

> * * * a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute. * * *

Accord, *Murphy* v. *Waterfront Commission*, *supra*, 378 U.S., at 75.

The assertion of the privilege at the time of the attempted use of the information—the point at which the information might be incriminating—would both honor the privilege and prevent the taxpayer from drawing "a conjurer's circle around the whole matter," *United States* v. *Sullivan*, 274 U.S. 259, 264, by refusing to register and pay the tax at all.[21] On the

[21] In *Sullivan* the Court held that the privilege against self-incrimination could not be relied upon to excuse a failure to file an income tax return. We recognize that there is a clear distinction between the matters involved here—registration and filing of a wagering tax return—and the filing of an income tax return at issue in *Sullivan*. This is so because the income tax return permits reporting of income without specific identification of source. We point out, however, that, assuming that the ap-

other hand, upholding refusal to register "would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim." *Albertson* v. *Subversive Activities Control Board*, 382 U.S., at 79.[22] In practical effect, it would provide exemption from an otherwise valid tax.[23]

C. THE ACCOMMODATION PROPOSED IS A VIABLE ONE

Because petitioner failed to register and failed to pay the special occupational tax, the present case is not a proper one in which to resolve all of the issues that might ultimately arise in the event of a prosecution outside the area of the tax laws. Nevertheless,

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prehension of incrimination in filing a wagering tax return is not insubstantial, a distinction can be drawn between the requirement to register and file a wagering tax return (see *Conti* v. *United States*, No. 330, this Term, *petition for certiorari pending*) and the *payment* of the excise tax on wagering. Payment can be effectuated through means not necessarily having an incriminatory potential. See our briefs in opposition to certiorari in *Grosso* v. *United States*, No. 181, pp. 5–6, and *Conti* v. *United States*, No. 330, pp. 5–6, both this Term, *petitions for certiorari pending*.

[22] While we acknowledge that this case is unlike *Sullivan* in certain respects, we contend that *Albertson* is likewise distinguishable. Neither of those cases, we submit, should therefore be regarded as controlling here. Rather, we suggest, the appropriate result is one that is consistent with both of those decisions, but one that differs from the result reached in either of them.

[23] Although the decision in this case will have no effect on the income tax in general, see note 21, *supra*, it may be controlling in a case involving any other excise or special tax, if the underlying activity of the registrant must be revealed and is in some way repugnant to federal, state, or local law. In cases where that might not be so apparent, the resolution here suggested has great efficacy for it makes a tribunal rather than the taxpayer the arbiter of the merits of the privilege claim.

we think it appropriate to address ourselves to certain of those issues in order to demonstrate that the rationale urged is a viable one for effectuation of the privilege.

We contend that the registration provision should in all events be upheld, but suggest in this part of our argument that, so far as necessary to the achievement of constitutional protections, the States as well as the federal government should be prohibited from making use of information gained from a registrant in connection with a criminal prosecution based on the underlying activity, at ~~most~~ least insofar as acts prior to registration are involved. For example, neither a State, compare *Irvine* v. *California,* 347 U.S. 128, nor the federal government, compare *United States* v. *Zizzo,* 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915, could use the fact of registration as represented by the tax stamp as evidence that a defendant had participated in illegal gambling activities. Moreover, it would seem equally impermissible to use any of the information disclosed as "a link in the chain of evidence" necessary to prosecution, *Hoffman* v. *United States,* 341 U.S. 479, 486; *Blau* v. *United States,* 340 U.S. 159, or for investigatory leads, *Murphy* v. *Waterfront Commission, supra,* 378 U.S., at 78–79, relying on *Counselman* v. *Hitchcock,* 142 U.S. 547, 564, 586. See also *Albertson* v. *Subversive Activities Control Board, supra,* 382 U.S., at 78; *Malloy* v. *Hogan,* 378 U.S. 1, 12–13. And the burden of showing "an independent, legitimate source for the disputed evidence," *Murphy* v. *Waterfront Com-*

mission, 378 U.S., at 79 n. 18, would be on the prosecution.

It is not necessary that the Court attempt to resolve at this time all of the possible issues which might flow from acceptance of our suggested rationale.[24] The framework for their resolution is clearly indicated by the cases upon which we here rely, as well as by those cases involving the application of the Fourth Amendment, *e.g., Wong Sun* v. *United States,* 371 U.S. 471; *Nardone* v. *United States,* 308 U.S. 338; *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385.[25]

D. ON EITHER THEORY PRESENTED BY THE GOVERNMENT, THE JUDGMENT SHOULD BE AFFIRMED

Petitioner was convicted for wilful failure to register and pay the occupational tax,[26] and for conspiracy to avoid its payment. If Point I of our argument is accepted and the *Kahriger* and *Lewis* cases followed, affirmance of the judgment below is clearly dictated.

Although the appropriate disposition of the case presents a more difficult question if our alternative argument is adopted, we suggest that the result should

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[24] We have not discussed, and there is no need for the Court presently to consider, any possible relationship between the privilege against self-incrimination and the so-called "required records" doctrine, see *Shapiro* v. *United States,* 335 U.S. 1. No such issue is involved on the facts of this case.

[25] See also Note, *Scope of Taint Under the Exclusionary Rule of the Fifth Amendment Privilege Against Self-Incrimination,* 114 U. Pa. L. Rev. 570 (1966).

[26] Under 26 U.S.C. 7203, which provides in part: "Any person required * * * to pay any * * * tax, or * * * make a return * * *, keep any records, or supply any information, who willfully fails [to do so when required] * * * shall be fined not more than $10,000, or imprisoned not more than 1 year * * *."

be the same. We start from the premise that the conduct was unlawful and known to be so under the authority of this Court's decisions, *i.e., Kahriger* and *Lewis*. A further holding that it was unlawful—albeit one resting on a different rationale—hardly affords a justification or excuse for a prior deliberate flouting of valid laws.

Because the requirements of federal law were plain, *James* v. *United States*, 366 U.S. 213, is inapposite. In that case, the conviction was set aside only because it was thought that the defendant might have relied upon clear authority in his favor. Similarly, the defendant involved in *United States* v. *Murdock*, 290 U.S. 389, relied on the absence of any dispositive ruling on the issue he asserted; indeed, he specifically requested instructions with respect to his good faith belief in the position he took. In contrast, petitioner at no time claimed that his conduct was governed, motivated, or shaped in any way by a good-faith quandary about his constitutional rights. In such circumstances, it can hardly be said that reversal is warranted.[27]

[27] In *Murphy* v. *Waterfront Commission*, *supra*, at 79–80, we realize, the Court set aside the judgment of civil contempt and restored the parties to the situation prevailing at the time when the answers were to be given. Civil contempt is a coercive remedy and its exercise is to be confined to the use of the least possible power to achieve compliance. The Court may well have concluded in *Murphy* that its declaration of the parties' rights and obligations removed any apparent necessity for the sanction. Manifestly, that situation is different from the one presented by a criminal conviction for violations of valid laws. See also *Dennis* v. *United States*, 384 U.S. 855, 864–867, and the cases discussed therein, at 866.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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SEPTEMBER, 1966.

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APPENDIX

FORM 11-C
Rev. July 1963

U.S. Treasury Department—Internal Revenue Service

SPECIAL TAX RETURN AND APPLICATION FOR REGISTRY—WAGERING

(See Instructions on reverse for time and place for filing return)

Return for period from ..... to June 30, 19.....
(Month, day, and year)

Check one: ☐ First return and application ☐ Renewal return and application ☐ Supplemental return and application

1. Name: True name .....

Alias, style, or trade name, if any .....

2. Address: Residence .....
(Number and street)

(City) (County) (State)

Business .....
(Number and street)

(City) (County) (State)

3. If this is a supplemental application, please explain and give your Special Tax Stamp No. and Registration No. (see instruction 2)

.....

.....

.....

.....

(If additional space is required for items 4, 5 (a), 5 (c), or 6, attach additional sheets, identifying each entry as to item number.)

4. If taxpayer is a firm, partnership, or corporation, give true name of members or officers.

True name	Title	Home address

5. Are you or will you be engaged in the business of accepting wagers on your own account? ☐ Yes ☐ No (Check one)

If yes, complete (a), (b), and (c) of this item.

(a) Name and address where each such business is or will be conducted.

Name of location	Street address	City and State

(b) Number of employees and/or agents engaged in receiving wagers on your behalf .....

(c) True name, current address, and special tax stamp number of each such person.

True name	Special stamp No. in present use	Street address	City and State

6. Do you receive or will you be receiving wagers on behalf of or as agent for some other person or persons? ☐ Yes ☐ No (Check one)

If yes, give true name and address of each such person.

True name	Street address	City and State

For District Director's Use Only

.....
(Stamp number)

.....
(Date issued)

.....
(Registration number)

Tax	$.....
Penalty	$.....
Interest	$.....
Total	$.....

Make remittance payable to the Internal Revenue Service. Payment may be made by cash, check or money order.

SIGNATURE AND VERIFICATION

I declare under the penalties of perjury that this return and/or application (including any accompanying statements or lists) has been examined by me and to the best of my knowledge and belief is true, correct, and complete.

....., 19.....
(Date)

.....
(Signature)

.....
(State whether individual owner, member of firm, or if corporation officer, give title)

INSTRUCTIONS

1. Who Must File.—Every person who is liable for the 10-percent excise tax imposed by section 4401 of the Internal Revenue Code, and every person who is engaged in receiving wagers for or on behalf of any person so liable, is subject to a special tax of $50 per year imposed by section 4411 of the Code, and must file Form 11–C.

Section 4421 of the Code defines the term "wager" to mean (1) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (2) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (3) any wager placed in a lottery conducted for profit.

The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (1) the wagers are placed, (2) the winners are determined, and (3) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under sections 501 and 521 of the Code, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

2. When To File.—(a) First and Renewal Returns and Applications for Registry—Form 11–C serves two purposes: (A) A special tax return and (B) an application for registry. The first return and application for registry must be filed prior to engaging in the activity which results in liability for the special tax on wagering. Renewal returns and applications are required to be filed on or before July 1 of each year thereafter during which taxable activity continues. Changes in ownership which require a return and application for registry, and which result in special tax liability, include the following:

(1) Admission of new members to a firm or partnership.

(2) Formation of a corporation to continue the business of a partnership.

(3) Continuance of the corporate business by a stockholder after the corporation is dissolved.

(b) Supplemental Applications for Registry.—Change of place of business or residence address must be registered with the District Director of Internal Revenue by filing a Form 11–C and checking the block designated "Supplemental Return and Application," stating the new address and the date of change before (i) he engages in any wagering activity at the new address, or (ii) the termination of a 30-day period which begins on the day after the date of such change, whichever occurs first. Any other change must also be registered within 30 days after such change; examples of such other changes include the following: (1) Continuance of the operation of a business of a deceased person, who has paid the special tax, by the surviving spouse or child, or executor or administrator, or other legal representative, (2) Continuance of a business by a receiver or trustee in bankruptcy, (3) Continuance of a business by an assignee for the benefit of creditors, (4) Withdrawal from a firm or partnership of one or more members, and (5) Mere change of corporate name. Failure to comply with these requirements will result in additional tax and penalty. The taxpayer's special tax stamp shall accompany such supplemental application for proper notation by the District Director.

An individual accepting wagers on his own account shall register, by filing a Form 11–C designated "Supplemental Return" not later than 10 days after engaging a new agent or employee to receive wagers, the name, address, and number appearing on the special tax stamp of each such agent or employee. Likewise, an agent or employee receiving wagers on behalf of another shall register the name and address of each additional person by whom he is engaged to receive wagers within 10 days after he is so engaged.

3. Where To File.—The return must be filed with the District Director of Internal Revenue for the district in which is located the taxpayer's office or principal place of business or, if he has no office or principal place of business in the United States, with the District Director for the district in which he resides. If the taxpayer has no office, residence, or principal place of business in the United States, the return must be filed with the District Director of Internal Revenue, Baltimore, Maryland, 21203.

4. Computation of the Special Tax on Wagering.—Special tax liability is computed from the first of July of each year, or the first day of the month during which business is commenced, to the thirtieth day of June following. Where business is begun after the month of July, the tax to be remitted is computed by multiplying the monthly rate of $4.16⅔ by the number of months remaining in the fiscal year. If the resulting amount involves a fraction, the full cent must be included. Example: If a person first commences business in November, liability should be computed as follows: $4.16⅔×8 (the number of months remaining in the fiscal year) equals $33.33⅓, or $33.34, the amount to be remitted.

5. Penalties.—If the return is not filed with the District Director prior to engagement in the activity which results in liability for the occupational tax on wagering, the penalty prescribed by sections 6651 and 6653 of the Internal Revenue Code may be incurred. In addition, under the provisions of section 7262 of the Code any person who does any act which makes him liable for the special tax, without having paid such tax, shall be fined not less than $1,000 and not more than $5,000. Section 7273 (b) provides that any person who fails to post or exhibit special wagering tax stamps in accordance with section 6806 (c) shall be liable to a penalty of $50 if failure to comply is due to negligence or $100 if due to willful neglect or refusal. For willful failure to file a return or pay the tax, the penalties under sections 7201 and 7203 may be imposed. Under the general provisions of section 1001 of Title 18 of the United States Code, whoever knowingly makes any false or fictitious statement with respect to the payment of the special tax, such as the giving of a false name or address, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

U.S. GOVERNMENT PRINTING OFFICE: 1965—O-691-656

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

COSTELLO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 3. Decided March 4, 1968.

PER CURIAM.

Upon the suggestion of mootness by reason of the death of the petitioner, the judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to the United States District Court for the District of Connecticut for such disposition as law and justice require.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.